Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

No. 08-606

In the Supreme Court of the United States

Florence Hervey,

Petitioner,

v.

County of Koochiching; Sheriff Duane Nelson, individually and in his official capacity; Undersheriff John Mastin, individually and in his official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Leslie L. Lienemann
Counsel of Record
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300
Counsel for Petitioner

2008 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED

I. May the Court determine at summary judgment that an employee objecting to her supervisors' actions and hostility by using the language of the internal anti-discrimination policy is not protected conduct as a matter of law?

II. May the Court determine at summary judgment that, as a matter of law, causation by temporal proximity is defeated in a retaliation case where the employer criticized an employee but did not show that it intended to administer discipline before becoming aware of protected conduct?

III. Must an employee show exactly the same offense in a comparator to have access to anti-discrimination protection in Title VII discipline matters?

PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Appendix Table of Contents v

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 13

I. Opposing a Practice by Resort to an Employer's Internal Policy Against Discrimination and Harassment Should be Protected Conduct under Title VII. 13

A. The Holding of the Eighth Circuit is in Conflict with Decisions of Other Courts of Appeals Writ 14

B. Question is Important 15

II. The Eighth Circuit Court of Appeals Ruled in Conflict with Other Circuits When it Determined at Summary Judgment that, as a Matter of Law, Causation by Temporal Proximity is Defeated in a Retaliation Case Where the Employer Criticized an Employee but did not Show that it Intended to Administer Discipline Before Becoming Aware of Protected Conduct 16

A. Other Circuits Hold that Defendants Must Show a Legitimate Business Reason with Evidence in the Record 20

B. Question Is Important 21

III. An Employee Should Not Have to Show Exactly the Same Offense in a Comparator to have Access to Anti-discrimination Protection in Title VII Discipline Matters 21

A. Split Among the Circuits 23

B. The Question is Important 25

Conclusion 26

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Appeals,
June 9, 2008 ..... A-1

Memorandum Opinion of the District Court,
October 20, 2006 ..... A-37

Order of the Court of Appeals
Denying Rehearing and
Rehearing *En Banc*
Dated August 5, 2008 ..... A-75

Order Amending Judgment
Dated September 26, 2008 ..... A-76

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. Moody,
422 U.S. 405, 417 (1975) 13

Burke-Fowler v. Orange County, Florida,
447 F.3d 1319 (11th Cir. 2006) 25

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 13, 16

Clark v. Runyon,
218 F.3d 915 (8th Cir. 2000) 22

Cook v. CSX Transp. Corp.,
988 F.2d 507 (4th Cir. 1993) 24

Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 211 Fed. Appx. 373 (6th Cir. Nov. 14, 2006) *cert. granted*,
128 S. Ct. 1118 (2008) 14, 26

Davis v. City of Philadelphia Water Dept.,
57 Fed. Appx. 90 (3rd Cir. 2003) 24

Davis v. Team Electric Co.,
520 F.3d 1080 (9th Cir. 2008) 20

E.E.O.C. v. Brown & Root, Inc.,
688 F.2d 338 (5th Cir. 1982) 24

E.E.O.C. v. Total Systems Services, Inc.,
221 F.3d 1171 (11th Cir. 2000) 15

Evans v. City of Houston,
246 F.3d 344 (5th Cir. 2001) 15

Ezell v. Potter,
400 F.3d 1041 (7th Cir. 2005) 24

Faragher v. Boca Raton,
524 U.S. 775 (1998) 13, 16

Freytes-Torres v. City of Sanford,
270 Fed. Appx. 885 (11th Cir. 2008) 20

Garcia v. Bristol-Myers Squibb Co.,
535 F.3d 23 (1st Cir. 2008) 23

Graham v. Long Island RR,
230 F.3d 34 (2nd Cir. 2000) 24

Kotcher v. Rosa and Sullivan Appliance Center, Inc.,
957 F.2d 59 (2nd Cir. 1992) 15

Lynn v. Deaconess Medical Center-West Campus,
160 F.3d 484 (8th Cir. 1998) 22

McAlester v. United Air Lines, Inc.,
851 F.2d 1249 (10th Cir. 1988) 25

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ..... passim

Mickey v. Zeidler Tool and Die, Co.,
516 F.3d 516 (6th Cir. 2008) 19

Nix v. WLCY Radio/Rahall Communications,
738 F.2d 1181 (11th Cir. 1984) 25

Palesch v. Missouri Com'n. on Human Rights
233 F.3d 560 (8th Cir. 2000) 22

Patches v. City of Phoenix,
68 Fed. Appx. 772 (9th Cir. 2003) 25

Perry v. McGinnis,
209 F.3d 597 (6th Cir. 2000) 24

Riser v. Target Corp.,
458 F.3d 817 (8th Cir. 2006) 12, 17

Smith v. Chrysler Corp.,
155 F.3d 799 (6th Cir. 1998) 20

STATUTES:

28 U.S.C. §1254(1) 1

Section 704(a) of Title VII of the 1964
Civil Rights Act, 42
U.S.C. §2000e-3(a)(1) ..... passim

PETITION FOR WRIT OF CERTIORARI

Petitioner Florence Hervey respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on June 9, 2008.

OPINIONS BELOW

The June 9, 2008 opinion of the court of appeals is reported at 527 F.3d 711 (8th Cir. 2008) and is set out at pp. A-1 – A-36 of the Appendix. The August 5, 2008 order of the court of appeals denying rehearing and rehearing *en banc*, which is not officially reported, is set out at p. A-75 of the Appendix. The October 20, 2006 opinion of the district court, which is not officially reported, is set out at pp. A-37 – A-74 of the Appendix. The September 26, 2008 order amending judgment by the district court, which is not officially reported, is set out at p. A-76 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered June 9, 2008. A timely petition for rehearing and rehearing *en banc* was denied on August 5, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a), provides in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The events giving rise to this action arose out of actions taken against a female jail administrator who objected to having her status and responsibilities stripped away from her. For twenty-five years, Florence Hervey worked as a Koochiching County Corrections Officer. The County created a position of Jail Administrator/E911 Administrator to meet the Department of Corrections ("DOC") agency licensing requirements and promoted Hervey into a combined position to both manage the jail and the emergency 911 communications.[1] For two years, she developed policies, supervised the E911 corrections officers and managed the administration of the jail. She received high praise from the DOC for her work. Sheriff Duane Nelson described her as a "godsend."[2] Hervey had not received any significant job criticisms in her 27 years with the County.[3] Hervey had not received any discipline or criticism submitted into her personnel file in her 27 years.[4]

---

[1] *See,* Order of District Court, A-39 to A-40.
[2] *See,* Order of District Court, A-40.
[3] *See,* Order of District Court, A-37 to A-38.
[4] *See,* Brief of Appellant, p. 37.

Then, in March 2003, Nelson appointed a new Undersheriff, John Mastin, who immediately sought to subordinate her position to his.[5] In April 2003, Hervey objected to this action as improper according to her job description approved by the County Board.[6] In a meeting called by the Sheriff because of her objections, he and Mastin became angry and hostile to Hervey, berating her for objecting to the action.[7] During the meeting, Hervey invoked the internal grievance process name for her complaints of discrimination, stating that she believed they violated the "Respectful Workplace" policy.[8] The evidence in the record shows that County employees use the term, "Respectful Workplace issues," synonymously with claims of discrimination, despite the fact that the employer decided to add other kinds of harassment and hostility claims not necessarily based on a protected class reason.[9]

After the meeting, Mastin and Nelson continued to treat Hervey with hostility. In July 2003, Hervey again complained to the Sheriff that he was violating the Respectful Workplace Policy.[10] In October, 2003, Hervey again complained to the Sheriff that they had Respectful Workplace issues.[11] Sheriff Nelson responded by telling her that he did not "need," her complaints.[12]

---

[5] *See,* Opinion of Court of Appeals, A-2.
[6] *Id.*
[7] *See,* Opinion of Court of Appeals, A-2 to A-3.
[8] *See,* Opinion of Court of Appeals, A-3; A-17.
[9] *See,* Opinion of Court of Appeals, A-17.
[10] *See,* Brief of Appellants, p. 7.
[11] *Id.*
[12] *Id.*

On February 6, 2004, Mastin gave Hervey a negative but vague performance evaluation containing two examples of the criticisms.[13] The only concrete examples of criticism were: *(1) Sheriff's Secretary told Mastin that Hervey just pretended to respect her.*[14] . For this, Hervey's "teamwork" was rated 1 out of 5.[15] *Florence did not realize that the Sheriff's secretary has self-esteem issues and as a leader, she should understand the secretary's inadequacies and make allowances for them.*[16] For this, Hervey's "work planning" was rated 2 out of 5.[17]

On February 7, 2004, Hervey began drafting a complaint to the County and to the Minnesota Department of Human Rights.[18] She took off work on February 10 and 11 to complete the extensive booklet, including citations to 37 exhibits, showing that she believed she was being subjected to gender discrimination and a hostile work environment because she is a woman.[19] ("I do feel very strongly that this would not be happening to me if I were a man.")[20]

While Hervey was drafting the complaint at home, Mastin called her.[21] Hervey told Mastin that she had left him a voice mail message the day before.[22]

---

[13] *See,* Opinion of Court of Appeals, A-4.
[14] *See,* Petition for Rehearing, pp. 4-5.
[15] *See,* Order of District Court, A-47.
[16] *See,* Petition for Rehearing, pp. 4-5.
[17] *Id.*
[18] *See,* Petition for Rehearing, pp. 4-5.
[19] *See,* Opinion of Court of Appeals, A-4 to A-5.
[20] *See,* Petition for Rehearing, p. 5.
[21] *See,* Opinion of Court of Appeals, A-5.
[22] *Id.*

Mastin told her that he did not receive a voice mail message from her. Mastin told her that she had not told her subordinate Mary Lou *why* she would not be in.[23] Hervey explained that she did not provide any explanation to Mary Lou and she identified to Mastin the people to whom she had asked to give messages about her absences, since he was not at work when she called.[24] Mastin stated he wanted to talk more about her taking off time.[25] Hervey asked him why he wanted to meet to talk about the situation again and Mastin did not say why.[26] Hervey concluded from this conversation that Mastin had figured out that she took the time off to draft a complaint against him.[27]At the end of her complaint, Hervey wrote, *"What am I doing with these two days off? I am compiling this documentation. Do I think the Captain [Mastin] is suspicious of me? Yes."*[28]

Hervey went into work the next day and Mastin asked to meet with her.[29] Mastin called Hervey a "liar," saying she had not told anyone that she was not going to be into work on February 10th. Hervey told Mastin the names of the individuals to whom she had talked and said that she had left him a voicemail.[30] Mastin denied receiving a voicemail from her but admitted he received a message from her co-worker that she would be out on February 11th.[31]

---

[23] *See,* Petition for Rehearing, p.6

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See,* Brief of Appellant, p. 43.

[29] *See,* Opinion of Court of Appeals, A-5.

[30] *See,* Petition for Rehearing, p. 6.

[31] *Id.*

Hervey got up to leave the meeting to go to work. Mastin told her to sit down and said she could not leave until he was "done," with her.[32] Hervey sat down as he instructed.[33] Then, Mastin said to her, "In the past you said that you had respectful workplace issues."[34] Mastin made this statement without having any information from Hervey that she had filed a complaint.[35] Hervey responded to his statement by saying that she did have respectful workplace issues and that she had that morning sent a complaint to the Minnesota Department of Human Rights.[36] Mastin's immediate response to her disclosure was that he would suggest to the Sheriff that Hervey report to work in "brown," [as opposed to wearing a supervisory white shirt] because she was no longer a supervisor.[37]

Mastin characterized the conversation with Hervey as, "Met with Florence and during our conversation I was advised that she has lodged a complaint with some agency stating that I'm sexist and there's an investigation in the process."[38]

Also on February 12, 2004, Hervey and her spouse, LeRoy Hervey, went to the office of the County Coordinator, Theresa Jaksa. Hervey told Jaksa that she was there to make a "Respectful Workplace" complaint. Hervey delivered to Jaksa a fully annotated document describing sex discrimination,

---

[32] *Id.*

[33] *See,* Petition for Rehearing, pp. 6-7.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See,* Petition for Rehearing, p.7.

[38] *See,* Petition for Rehearing, p.7.

sexual harassment and retaliation.[39] Jaksa refused to accept the complaint.[40]

On February 13, 2004, Mastin drafted a private memorandum accusing Hervey of a number of transgressions never included in her performance evaluation of February 6, 2004.[41] He wrote that Hervey was "threatening" her supervisors with violations of the Respectful Workplace policy.[42] On February 18th, he took away her master key and supervisory duties in a publicly posted humiliating memorandum.[43] According to the February 13th memorandum, he had spoken with Hervey on January 20, 2004 regarding her entering his office and asked her not to do so again.[44] Yet, Mastin did not take away her master key until one month later on February 18, 2004, *just days after* Hervey's protected conduct.[45]

Mastin and Nelson took *no action* regarding Hervey "supposedly lying" about time off until March 2nd.[46] On March 2nd, they issued her a warning about not obtaining pre-approval for taking time off and accusing her of being "untruthful," about informing Mastin of her taking time off.[47]

---

[39] *See,* Brief of Appellant, p. 8.
[40] *Id.*
[41] *See,* Opinion of Court of Appeals Dissent, A-30; Petition for Rehearing, p. 8.
[42] *See,* Opinion of Court of Appeals, A-5.
[43] *See,* Opinion of Court of Appeals Dissent, A-30 to A-31.
[44] *See,* Petition for Rehearing, p. 8.
[45] *See,* Brief of Appellant, p. 9; Petition for Rehearing, p 8.
[46] *See,* Opinion of Court of Appeals Dissent, A-31; Petition for Rehearing, p. 9.
[47] *Id.*

Over the next several months, the record shows that Mastin and Nelson disciplined Hervey shortly after some event in the EEOC charge or litigation.[48] For example, on May 28, 2004, the day after receiving a copy of Hervey's request for an EEOC Right to Sue letter that had been faxed to the County, Mastin forced himself into Hervey's lawyer's office with another armed officer.[49]

In June 2004, two days after the EEOC Right to Sue was issued to Hervey and copied to Defendants, Mastin and Nelson disciplined Hervey and told another corrections employee that, had it not been for their desire to discipline Hervey, he would not have been disciplined.[50]

By memorandum dated February 28, 2005, Mastin recommended that Nelson take action against Hervey because he thought that Hervey was "provoking" he and Nelson to do something that would help her in the litigation she brought against the County and "us."[51] His recommendation was to move towards dismissing Hervey or to put Hervey on administrative leave.[52] Days later, in March, 2005, Hervey was suspended for 5 days without pay.[53]

In July 2005, days after Hervey's attorney took the deposition of John Mastin's son, Richard Mastin,

---

[48] *See,* Brief of Appellant, pp. 12, 13, 15, 16.
[49] *See,* Brief of Appellant, p. 12.
[50] *See,* Opinion of Court of Appeals Dissent, A-32.
[51] *See,* Brief of Appellant, p. 15.
[52] *Id.*
[53] *See,* Opinion of Court of Appeals, A-7; Brief of Appellant, p. 15.

Hervey was suspended for 15 days in a humiliating manner by disabling her key card and locking her out of the building without explanation, requiring her to seek permission from her subordinates to enter the building so she could discover she had been suspended.[54]

The allegations that supported the suspensions included, "not being a team player;" not leaving a message on an answering machine when she said that she did; allegedly violating confidentiality between employees within the department; allegedly refusing to meet with Mastin; and explaining to a union employee her rights before investigating a possible workplace violation.[55] For these and similar allegations, she was suspended without pay twice, for a total of 20 days.[56]

Other employees of the Sheriff's Department did not suffer any consequences for comparable or more serious behavior. For example, Sheriff's Department employees often arranged their own coverage and took off time with approval after the fact.[57] For example, Sheriff Nelson recently learned that Mastin lied on his application to obtain his law enforcement license by swearing he had never been convicted of a felony when, in fact, he had been convicted of a felony.[58] Mastin violated confidentiality and disclosed private personnel data to a Sheriff's Deputy, resulting in publication of the private personnel data

---

[54] *See,* Opinion of Court of Appeals Dissent, A-33.

[55] *See,* Opinion of Court of Appeals, A-7.

[56] Hervey has denied these accusations and put forth evidence that these accusations are untrue.

[57] *See,* Opinion of Court of Appeals Dissent, A-27.

[58] *See,* Opinion of Court of Appeals, A-12 to A-13.

to the newspaper, which Sheriff Nelson admitted he believed violated the Minnesota Government Data Practices Act and the district court stated it believed the behavior justified discipline.[59] Yet, Nelson did not discipline Mastin.[60] Mastin violated the union contract by failing to properly conduct a disciplinary meeting with a union employee by providing him the required notice of his rights and access to a union representative, yet Nelson did not discipline Mastin.[61]

Sheriff Deputy Richard Mastin violated the Koochiching County Sheriff's Office Code of Conduct by driving intoxicated over the legal limit causing a single vehicle car accident.[62] He received no discipline from the Sheriff's Department.[63] In each of these cases, the Sheriff made the final decision on whether or not to discipline the employee. All employees were rated as c-band employees in the County's comparable worth study. Yet, the Sheriff decided to only discipline Hervey, the only woman and the only employee to engaged in protected conduct under Title VII.[64]

After filing a timely charge with the EEOC, Hervey commenced this action under Title VII and the Minnesota Human Rights Act in the United States

---

[59] *See,* Order of District Court, A-73 to A-74.

[60] *See,* Order of District Court, A-74.

[61] For a similar allegation against Hervey, Mastin purported to strip her of all supervisory responsibility. *See,* Opinion of Court of Appeals, A-13.

[62] *See,* Opinion of Court of Appeals, A-14.

[63] *Id.*

[64] *See,* Opinion of Court of Appeals, A-12 to A-14.

District Court for the District of Minnesota.[65] Hervey alleged that the County treated her differently based on her sex, that she was subjected to a hostile environment based on her sex and that she had been retaliated against by the County, Nelson and Mastin for engaging in protected activity for opposing a practice prohibited by Title VII and for participating in an investigation, proceeding or hearing under this title.[66]

The County, Nelson and Mastin moved for summary judgment on the retaliation claim and argued, *inter alia*, that Hervey failed to establish causation in her *prima facie* case. The district court called the issue a "close question," but held that causation was defeated because Hervey did not engage in protected conduct before the "feud," between she and her supervisors Mastin and Nelson began.[67]

The district court found that Hervey's opposition to Nelson and Mastin harassing her and treating her differently when stated in the context of County's internal anti-discrimination policy words, "Respectful Workplace," was not protected conduct.[68] The court of appeals affirmed.[69]

The district court then held that Hervey could not establish the causation prong of the *prima facie* case because the Court presumed as a matter of law that the County intended to discipline Hervey before she

---

[65] *See,* Opinion of Court of Appeals, A-1 to A-2.

[66] *Id.*

[67] *See,* Order of District Court, A-38, A-67 to A-70.

[68] *See,* Order of District Court, A-43; A-52; A -74.

[69] *See,* Opinion of Court of Appeals, A-17; A-25.

disclosed that she filed a charge of discrimination, reasoning that Hervey could not insulate herself from discipline by using Title VII's anti-retaliation provisions.[70] The court of appeals affirmed, holding that "the defendant does not bear the burden to show that he already intended to administer discipline before the plaintiff interjected protected activity; the burden of persuasion is on the plaintiff to show that more than temporal proximity supports her claim that the employer's legitimate explanation is a pretext for unlawful retaliation."[71]

The County, Nelson and Mastin also moved for summary judgment. The County argued, *inter alia*, that Hervey could not prove differential treatment or hostile environment was based on sex.[72] Hervey submitted evidence that she suffered discrimination and a hostile environment because of sex on evidence that she was disciplined differently from male comparators. The district court held that Hervey could not show that the male comparators engaged in the "same conduct without any mitigating or distinguishing circumstances."[73] The court of appeals affirmed, reasoning that Hervey did not show the comparators engaged in the "same offense and were disciplined in different ways." *Riser v. Target Corp.*, 458 F.3d 817 (8th Cir. 2006).[74]

Hervey filed a timely petition for rehearing and rehearing *en banc*. The petition was denied on

---

[70] *See*, Opinion of Court of Appeals, A-67 to A-70.
[71] *See*, Opinion of Court of Appeals, A-20.
[72] *See*, Order of District Court, A-43 to A-50; A-58 to 67.
[73] *See*, Order of District Court, A-61.
[74] *See*, Opinion of Court of Appeals, A-13 to A-14.

August 5, 2008.[75]

REASONS FOR GRANTING THE WRIT

I. OPPOSING A PRACTICE BY RESORT TO AN EMPLOYER'S INTERNAL POLICY AGAINST DISCRIMINATION AND HARASSMENT SHOULD BE PROTECTED CONDUCT UNDER TITLE VII.

Failure to protect an employee from retaliation for making a complaint pursuant to an employer's internal policy against discrimination and harassment undermines the employer's ability "to self-examine and to self-evaluate their employment practice and to endeavor to eliminate, so far as possible," unlawful discrimination and its lingering effects. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Moreover, the Supreme Court in *Faragher* and *Ellerth* has made participation in an employer's internal complaint procedure a virtual prerequisite to recovery. *See, Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). Specifically, the Court held as it did in these cases in order to "implement Title VII sensibly by giving employers an incentive to prevent and eliminate harassment and by requiring employees to take advantage of the preventive or remedial apparatus of their employers." *Faragher,* 524 U.S. at 777. The Court should accept this Writ to bring the Eighth Circuit law back into harmony with the purposes of *Faragher* and *Ellerth* so that employees who do take advantage of the preventive

---

[75] *See,* A-75.

or remedial apparatus of their employers are not unjustly penalized by losing anti-retaliation protections.

A. The Holding Of The Eighth Circuit Is In Conflict With Decisions Of Other Courts Of Appeals.

This Court recently granted a writ of certiorari in the unpublished case of *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.,* 211 Fed. Appx. 373 (6th Cir. Nov. 14, 2006), *cert. granted,* 128 S. Ct. 1118 (2008). *Crawford* raises the question of whether the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protects a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment. The question arises in this case in a similar context, as Hervey objected to behavior she believed to be discriminatory and harassing by using the name of the internal procedure regarding discrimination and sexual harassment, "The Respectful Workplace Policy," in making her objection to the Sheriff and Undersheriff. The court of appeals held that since the employer chose to include in its internal anti-discrimination and anti-harassment policy some actions that might or might not, by themselves, be considered discrimination, that the use of the policy name in objecting to an employment practice could not, as a matter of law, make the Sheriff and Undersheriff aware that she had engaged in protected conduct, thus defeating the causation element of the prima facie case.[76] Like *Crawford* in the Sixth Circuit, Hervey has been left unprotected from retaliation

[76] *See,* Opinion of Court of Appeals, A-17.

because she used the internal policy to state what she, in good faith, believed to be discrimination and sexual harassment when she objected to actions by Mastin and Nelson labeling her objections to the actions by the County's anti-discrimination policy name of "Respectful Workplace."

Other circuits hold that using internal anti-discrimination complaint procedures is protected conduct under Title VII's anti-retaliation provisions.

For example, in *Evans v. City of Houston,* 246 F.3d 344 (5th Cir. 2001), the court held that testimony in an internal grievance procedure was protected conduct, rejecting the city's contention to the contrary.

Similarly, in the Second Circuit, the court in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.,* 957 F.2d 59 (2nd Cir. 1992), found that making an internal complaint regarding a supervisor's sexual harassment was protected conduct.

Although the Eleventh Circuit has not concluded that participating in an internal investigation is protected activity under the participation clause, it has found that such participation is within the opposition clause. *E.E.O.C. v. Total Systems Services, Inc.,* 221 F.3d 1171 (11th Cir. 2000).

B. Question Is Important

Employees are expected to use the internal procedures to object to discrimination and harassment. Yet, in this case, by the employer

choosing to broaden the scope of the policy to protect employees from actions that may or may not also be discrimination or harassment, the court of appeals reached the anomalous result that an employee's use of the internal policy to object to discrimination and sexual harassment does not protect that employee from retaliation. Under *Faragher* and *Ellerth*, an employee is required to use the procedure, but if the employee identifies that her complaint is based on that procedures, she is then left unprotected from retaliation for doing what she is required to do. In fact, the more anti-social behavior that the employer attempts to disallow, the more likely an employee will not be protected from retaliation.

II. THE EIGHTH CIRCUIT COURT OF APPEALS RULED IN CONFLICT WITH OTHER CIRCUITS WHEN IT DETERMINED AT SUMMARY JUDGMENT THAT, AS A MATTER OF LAW, CAUSATION BY TEMPORAL PROXIMITY IS DEFEATED IN A RETALIATION CASE WHERE THE EMPLOYER CRITICIZED AN EMPLOYEE BUT DID NOT SHOW THAT IT INTENDED TO ADMINISTER DISCIPLINE BEFORE BECOMING AWARE OF PROTECTED CONDUCT.

The Eighth Circuit bypassed the *McDonnell Douglas prima facie* case and created an impermissible burden on the plaintiff by taking as true and unassailable a legitimate business reason not shown by evidence or even articulated by testimony. "Once again, because the record is

fully developed, we need not proceed through each step of the *McDonnell Douglas* burden-shifting framework, but may consider whether Hervey has provided sufficient evidence of retaliation to create a submissible case. *See Riser v. Target Corp.*, 458 F.3d 817, 820-21 (8th Cir.2006)."[77]

The court of appeals found that Hervey first engaged in protected conduct on February 12, 2004 when she told Mastin that she had filed a complaint with the Minnesota Department of Human Rights.[78] The court found that in the same conversation, Mastin stated he would recommend her demotion.[79] Importantly, the court held that "the defendant does not bear the burden to show that he already intended to administer discipline before the plaintiff interjected protected activity . . . "[80] The dissent disagreed with court's assumption that the recommendation of her demotion was a "logical consequence," of the accusation that Hervey had lied about whether she left a voicemail for Mastin.[81] There is no evidence in the record that Mastin intended to demote Hervey before she told him about her discrimination claim, but the court drew that inference in favor of the County Defendants as a matter of law to defeat Hervey's *prima facie* evidence of causation and considered no evidence to the contrary.

---

[77] *See,* Opinion of Court of Appeals, A-16.
[78] *See,* Opinion of Court of Appeals, A-17.
[79] *Id.*
[80] *See,* Opinion of Court of Appeals, A-20.
[81] *See,* Opinion of Court of Appeals Dissent, A-30.

Specifically, the dissent in the court of appeals decision stated:

> "The majority's insistence that "there is no reasonable inference of a retaliatory motive" because "even if Mastin concocted his version of the voicemail incident, Mastin did so before Hervey advised him of her protected activity" is unjustified. The majority points to no evidence establishing that Mastin definitively planned on disciplining Hervey prior to their meeting. The majority cites to notes that Mastin made in Hervey's personnel file about the February 12 meeting. The notes list six reasons for his recommendation that Hervey "continue as Jail Administrator with duties to be reviewed and discussed but wear the same uniform as the other correctional officers." Mastin, however, wrote the notes after the meeting, and there is no evidence tending to show he believed any of the reasons warranted discipline prior to Hervey's disclosure of her complaint. According to Hervey, Mastin did not discuss five of the six reasons listed on the note. Accepting Hervey's characterization of the meeting and viewing Mastin's notes in a light most favorable to Hervey, at least two reasonable inferences adverse to the defendants exist. First, Mastin disciplined Hervey solely for her untruthfulness, and because Hervey denies she was untruthful, a jury question exists as to whether the perceived untruthfulness was Mastin's true motivation for the discipline. Second, Mastin retaliated against Hervey for filing the complaint and attempted to conceal his

retaliatory motive by listing numerous, facially valid reasons for discipline in the notes. Contrary to the majority's assertion that Mastin's "action was a logical consequence of Hervey's pre-existing disciplinary problems," his action was not logical because it was the first time that Hervey had been disciplined at all for her alleged insubordination and incompetence. Previously, she had only been given oral reprimands to follow directives and to improve her performance. The sudden demotion was unexpected and came "moments," after Hervey told him she was filing a complaint against Mastin. Further, the notes do not suggest that Mastin had made up his mind to strip Hervey of her supervisory role or to recommend that she not wear a supervisor uniform before Mastin and Hervey met on February 12. The notes are a reflection of his thoughts after the meeting and do not rebut the retaliatory inference. Taken in a light most favorable to Hervey, we may not assume that Mastin's calling of a meeting on February 12 shows a preexisting plan to discipline her. Thus, a material question of fact was raised as to whether Hervey's demotion was due to her failure to request leave properly and alleged lies, or due to Mastin's reasons listed in her personnel file, or due to her filing of the complaint."[82]

---

[82] *See,* Opinion of Court of Appeals, A-29 to A-30.

A. Other Circuits Hold That Defendants Must Show A Legitimate Business Reason With Evidence In The Record.

In *Mickey v. Zeidler Tool and Die, Co.*, 516 F.3d 516 (6th Cir. 2008), the court applied the *McDonnell Douglas* test in its entirety, requiring the Defendant to proffer a legitimate non-discriminatory business reason when the Plaintiff made out her *prima facie* case of retaliation. In examining the reasons proffered by the Defendant, the Sixth Circuit Court of Appeals rejected claims unsupported by evidence in the record. Specifically, the court required the employer to "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Mickey*, 516 F.3d at 526 (quoting, *Smith v. Chrysler Corp.*, 155 F.3d 799, 806-07 (6th Cir. 1998).

In the unpublished opinion of *Freytes-Torres v. City of Sanford,* 270 Fed. Appx. 885 (11th Cir. 2008), the court also applied the *McDonnell Douglas* test in its entirety, rejecting Defendant's characterization of it's decision-maker's state of mind based on reasonable inferences in favor of the Plaintiff that the court found could be drawn from the circumstances. The Eleventh Circuit then reversed the district court's grant of summary judgment, finding that it had improperly considered to be true what the City "believed," to be true, rather than construing fact questions in the light most favorable to the Plaintiff. *See Freytes-Torres,* 270 Fed Appx. at 894, n.5.

In *Davis v. Team Electric Co.,* 520 F.3d 1080 (9th Cir. 2008), the court required the Defendant to show

evidence in the record of its nonretaliatory reason for terminating the Plaintiff. The Defendant contended that it laid off the Plaintiff for economic reasons, but produced no evidence in the record as to why this particular Plaintiff was chosen for layoff. On that basis, the Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment to the employer.

B. Question Is Important

Failure to require the Defendant in a retaliation action to meet its burden in the *McDonnell Douglas* test to show evidence of its legitimate reason allows the district court to draw impermissible inferences against the Plaintiff and defeat causation where reasonable minds could differ. Courts should not be deciding admittedly "close," cases by drawing adverse inferences based on "logical consequences," of disputed facts.

III. AN EMPLOYEE SHOULD NOT HAVE TO SHOW EXACTLY THE SAME OFFENSE IN A COMPARATOR TO HAVE ACCESS TO ANTI-DISCRIMINATION PROTECTION IN TITLE VII DISCIPLINE MATTERS.

This case presents a mature and clearly recognized inter-circuit conflict regarding enforcement of Title VII. In the instant matter, the Eighth Circuit has adopted a test to determine whether an inference of discrimination can be drawn in circumstances where comparators in the non-protected group are disciplined differently than in the protected group. This test is very strict, leaving almost no one able to

prove differential discipline unless they can show that the comparators were accused of the same offense. The test does not take into account the comparable seriousness of the offenses. Failure to do so disallows fair consideration of differential treatment and leads to illogical results and the lack of ability to prove intent by circumstantial evidence.

In the instant matter, the Eighth Circuit Court of Appeals followed the strict rule that, to prove discrimination based on similarly-situated persons of another sex, "the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *Clark v. Runyon,* 218 F.3d 915, 918 (8th Cir. 2000). *See also, Palesch v. Missouri Com'n. on Human Rights*, 233 F.3d 560, 568 (8th Cir. 2000)(same offense). In holding that the comparators to Hervey must have engaged in the same conduct, the Eighth Circuit engaged in exactly the scenario warned of in *Lynn v. Deaconess Medical Center-West Campus,* 160 F.3d 484, 488 (8th Cir. 1998)(holding district court applied "similarly situated" test too narrowly. Failure to apply "comparable seriousness" test "would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination. Common sense as well as our case law dictate that we reject such an approach.")

This is exactly what has happened in the instant matter. For example, the court dismissed as not

comparable criminal behavior by a Sheriff's deputy who received no punishment, despite the fact that the seriousness of criminal behavior would far outweigh the seriousness of an allegation that Hervey did not meet with Mastin every single day in which the opportunity arose. The court failed to compare the seriousness of Mastin lying to a licensing board to obtain a license necessary for employment in law enforcement with the seriousness of whether Hervey left a message on a voicemail or not. Hervey was disciplined, Mastin was not. The court distinguished these acts on the grounds that one happened a longer time ago, not whether one was more serious than the other. Certainly, misrepresenting whether one is a felon to a licensing board is far more serious and should be relevant to a finder of fact in determining whether punishment meted out to Hervey was based on gender, was sexually harassing, or was the result of retaliatory motive.

A. Split Among The Circuits

Other Circuit Courts of Appeal have applied different tests to analyze whether discrimination in discipline has occurred.

First Circuit

Garcia v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008)(comparators "need not be perfect replicas," but must "closely resemble one another in respect to relevant facts and circumstances.").

Second Circuit

Graham v. Long Island RR, 230 F.3d 34, 40 (2nd Cir. 2000)(comparable seriousness).

Third Circuit

Davis v. City of Philadelphia Water Dept., 57 Fed. Appx. 90, 92 (3rd Cir. 2003)(same conduct).

Fourth Circuit

Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993)(comparable in seriousness).

Fifth Circuit

E.E.O.C. v. Brown & Root, Inc., 688 F.2d 338, 341 (5th Cir. 1982)(similar circumstances).

Sixth Circuit

Perry v. McGinnis, 209 F.3d 597, 601 (6th Cir. 2000)(unpublished decision)("same conduct" test; plaintiff need not demonstrate "exact correlation," but must be similar in all relevant aspects).

Seventh Circuit

Ezell v. Potter, 400 F.3d 1041, 2049 (7th Cir. 2005)(similar conduct).

Ninth Circuit

Patches v. City of Phoenix, 68 Fed. Appx. 772, 773-74 (9th Cir. 2003)(unpublished decision)(similarly situated in all relevant aspects).

Tenth Circuit

McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1259(10th Cir. 1988)(similarly situated employees violated same rule or similar rule).

Eleventh Circuit

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984); *Burke-Fowler v. Orange County, Florida*, 447 F.3d 1319, 1323 (11th Cir. 2006)(require "quantity and quality" of comparator's misconduct to be "nearly identical").

B. The Question Is Important

The fact that nearly every federal circuit court of appeals has grappled with the question demonstrates its importance. To allow the split among the circuits to continue would permit some employees their day in court while depriving the same from others identically situated but for location. Moreover, employers also benefit when standards for imposing liability under employment discrimination statutes are consistent across the circuit courts of appeal. This is particularly evident in the case of a multi-jurisdictional employer. Allowing this split among circuits to continue would cause multi-district employers to be held liable in some circuits under

circumstances that would not create liability in others, essentially leaving the question of liability to be determined by the accident of location.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals. In the alternative, the Court should reserve ruling on this petition pending its ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 211 Fed. Appx. 373 (6th Cir. Nov. 14, 2006), *cert. granted,* 128 S. Ct. 1118 (2008).

Respectfully submitted,

Leslie L. Lienemann
Counsel of Record

Leslie L. Lienemann
Culberth & Lienemann, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3891

Florence Hervey,	*
Appellant,	* Appeal from the United
	* States District Court
v.	* for the District of
	* Minnesota.
County of Koochiching;	*
Sheriff Duane Nelson,	*
individually and in his	*
official capacity;	*
Undersheriff John Mastin,	*
individually and in his	*
official capacity,	*
Appellees.	

Submitted: October 19, 2007
Filed: June 9, 2008

Before RILEY, MELLOY, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Florence Hervey brought a claim pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and the Minnesota Human Rights Act, Minn. Stat. § 13.01 *et seq.*, alleging that her employer, Koochiching County, and supervisors Duane Nelson and John Mastin, discriminated against her on the basis of her sex, and retaliated against her for participation in a protected activity. She also brought

a state claim against the County for violation of the Minnesota Government Data Practices Act, Minn. Stat. § 13.02, subd. 7. The district court[1] granted summary judgment in favor of the defendants on all claims. *Hervey v. County of Koochiching*, No. 04-4537, 2006 WL 2990515 (D. Minn. Oct. 20, 2006). We affirm the dismissal of the discrimination and retaliation claims, and remand with directions to dismiss the Data Practices Act claim without prejudice.

I.

Because we are reviewing a grant of summary judgment, we describe the facts in the light most favorable to Hervey. Hervey worked for 25 years as a corrections officer in the Koochiching County Jail. In 2002, she was promoted to the newly-created position of jail administrator. At that time, Sheriff Duane Nelson decided that the jail administrator would report directly to him, rather than to Robert Byman, the undersheriff and second in command.

Hervey, Byman, and Nelson worked without incident for two years. Byman then announced his retirement, and Nelson selected John Mastin to be the new undersheriff. Even before his official start date, Mastin convinced Nelson to change the reporting structure of the department, so that all employees, including Hervey, reported through him. On April 3, 2003, a new organizational chart was distributed to the staff indicating this change.

Hervey objected to the new reporting structure. She e-mailed Nelson, explaining that her job description showed her reporting directly to him, not to the undersheriff. Two days later, Nelson called a

[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

meeting with Hervey, Byman, and Mastin. At the meeting, Nelson became upset with Hervey. He told Hervey that her e-mail had made him "so damn mad," that she was "disrespectful," and that he had received complaints from employees in the courthouse who were concerned that Hervey was trying to run the department. He also told her that the county commissioners wanted to reevaluate the need for a jail administrator. During this exchange, Hervey told Nelson that he had "respectful workplace issues." After an hour, Byman and Mastin left the room and Nelson apologized to Hervey. He gave her a hug and said, "you're going to have problems with [Mastin], aren't you?"

Disputes continued between Hervey and her two supervisors, Nelson and Mastin. On September 15, 2003, Hervey sent an e-mail to the county attorney asking whether it was lawful for her to be driving in a patrol car with a shotgun in it. When Nelson learned that Hervey had sought advice outside of the department without checking with him, he became angry. Nelson and Mastin stormed into Hervey's office and asserted that her action was in direct violation of a departmental directive, which stated that "[p]rior to going outside the department with any departmental concerns, approval shall be obtained from the Sheriff or [Undersheriff]." Nelson also accused Hervey of going behind his back to the county board and county coordinators.

After this incident, Mastin and Nelson gradually reduced Hervey's duties as jail administrator. Shortly after Mastin became the undersheriff, he asked Hervey to provide a written explanation of her job duties, and an explanation of who performed those duties before the jail

administrator position was created. Hervey perceived this request as a message that her position was unnecessary. Then, in late October 2003, Mastin told Hervey that he was going to take some of her responsibilities away from her, and transfer them to himself and the sheriff's secretary. Mastin also informed Hervey that she would keep the title of jail administrator, but that the position would be eliminated after she left the department.

During the fall of 2003, the County Board expressed concern that a jail administrator position was not necessary. As an alternative to eliminating the position, Nelson agreed to cut the budget for part-time corrections officers, with a consequence that Hervey was required to fill some of the lost shifts. Mastin informed Hervey that she must work two hours each day as a corrections officer, starting January 1, 2004, because the department was having budget problems.

On February 6, 2004, Mastin conducted a performance evaluation of Hervey, and gave her mixed reviews. He gave her high ratings for her knowledge of the position and productivity, but low ratings for teamwork, judgment, and dependability. Mastin's overall rating of Hervey was two out of five. He felt that she was supportive of her own staff in the corrections area, but needed to become a team player within the overall department.

Hervey did not agree with Mastin's evaluation. The next Monday, February 9, she decided that she was going to take time off to prepare a formal complaint against Mastin and Nelson. She left a message on Mastin's voicemail on Monday, and told two of her subordinates that she would not be at work on Tuesday. Tuesday night, Hervey again called two

of her subordinates to inform them that she would be gone on Wednesday. She asked them to leave a voicemail for Mastin. Hervey did not inform Mastin and Nelson, however, that she intended to file a complaint against them.

Mastin called Hervey at home Wednesday morning to ask why she had not been at work. He claimed that he had not received a voicemail from her, and that he wanted to meet with her on Thursday morning to discuss her absences. At the Thursday morning meeting, Mastin called Hervey a liar, again stating that he had not received a voicemail message. Hervey then told Mastin that she had filed a complaint with the Minnesota Department of Human Services. Mastin told Hervey that when the sheriff returned to the office, the three of them would meet, and Mastin told her he would "suggest to the sheriff that you report to work from now on in brown because you are no longer a supervisor." (Hervey App. 34).

On February 13, Mastin wrote to Sheriff Nelson, recommending that Hervey "continue as Jail Administrator with duties to be reviewed and discussed but wear the same uniform as the other correctional officers." (Hervey App. 174). Mastin opined that Hervey had "many admirable abilities," but that "her leadership and judgment" were inadequate. *(Id.* at 173). He listed six reasons for his recommendation: (1) Hervey's "wearing the white shirt of a supervisor has caused and will continue to cause tension among staff and lower morale within our office and other agencies," (2) the position of Jail Administrator as it had been conducted was not consistent with the formal job description, (3) Hervey failed "to responsibly supervise and provide adequate

attention to individuals that were not . . . able to attain the skills to perform their duties," and failed to "provide accurate, timely, and pertinent information required for the safety of the public and officers," (4) Hervey failed "to maintain credibility and integrity with supervisors by repeatedly providing misleading or incorrect requested information, not following directives, [and] causing or provoking situations by being argumentative or threatening," (5) Hervey failed "to work toward a teamwork approach that . . . would support the entire office in its mission to provide security and integrity to [the] community," and (6) Hervey was not "truthful with her supervisor when asked a direct question regarding an absence from work." *(Id.)*.

Nelson did not change Hervey's job title or reduce her pay in response to Mastin's memorandum. Hervey points to no evidence that she was prohibited from wearing a white shirt to work, as Mastin had recommended. On February 18, 2004, however, Mastin issued a memorandum, stating that all vacation time, office schedules, and memoranda regarding the agency must be cleared by him. (County App. 190). Mastin stated that the sheriff already had made this clear to him, but in light of Hervey's recent absences, Mastin wanted to make this point clear to Hervey and the rest of the staff. Mastin also took away Hervey's master key, because he was told that Hervey had been in his office while he was not there. Mastin replaced the master key with a key that would open only Hervey's office. In a letter to the county attorney, Hervey's attorney asserted that these actions "completely undermine[d] any authority Ms. Hervey has with her subordinates," and "demean[ed] her publicly to her

colleagues in all law enforcement agencies that use the law enforcement center." (County App. 188).

On March 2, 2004, Nelson and Mastin placed documentation in Hervey's personnel file of "the oral warning" regarding events of February 10. The memorandum warned Hervey for (1) "not following the directive to properly request leave from your supervisor before taking time off," and (2) "not being truthful to your supervisor regarding the notification of the request for time off." *(Id.* at 122). The notice advised that "[f]urther reoccurrence of these actions will result in discipline," and that the documentation would be removed from Hervey's personnel file in one year, if there were "no reoccurrence." *(Id.)*

In 2005, Nelson and Mastin suspended Hervey twice for insubordination. Each suspension was based on two points: (1) Hervey's failure to meet with Mastin on a daily basis, and (2) Hervey's failure to comply with directives and to meet job expectations. (County App. 7-9, 131-34). As to the former, Nelson and Mastin required Hervey to meet with Mastin each day. Because Mastin felt his job did not lend itself to a set schedule, he asked Hervey simply to stop by his office once each day. Hervey wanted to make an appointment, however, and e-mailed Mastin every day asking what time he would like to meet. Hervey failed to meet with Mastin on several occasions, and Nelson and Mastin ultimately cited this failure when suspending her for five days in March 2005 and fifteen days in July 2005.[2] The

---

[2] Nelson summarized his frustration with Hervey in this way: "You know, their offices are 10 feet apart. And there isn't any reason why they shouldn't be able to meet even if it's just to say, geez, you know, there's nothing going on today . . . it's perfectly quiet, do you have any questions for me. That's what

March suspension notice also cited two specific instances in which Hervey failed to comply with supervisory directives. The July notice cited sixteen specific instances in which Hervey failed to meet the reasonable expectations of her position. The July notice further warned Hervey that if she did not correct her deficiencies and comply with directives, then she would be terminated.

After receiving a right-to-sue letter from the EEOC, Hervey brought this claim, alleging that the defendants violated Title VII and the Minnesota Human Rights Act, because they discriminated against her based on sex, and retaliated against her for taking protected actions. She also brought a state-law claim against the county under the Minnesota Government Data Practices Act ("MGDPA"). Hervey claims that the county violated the act because Mastin, while working within the scope of his employment, disclosed private personnel data.

The district court granted summary judgment on the sex discrimination claims, holding that Hervey had not produced any evidence that Nelson and Mastin acted against her because she was a woman. *Hervey*, 2006 WL 2990515, at * 13. The court noted that "Nelson and Mastin might have been the world's worst supervisors, and they might have run the world's most hostile workplace, but, as long as they did not act against Hervey because she is a woman, they cannot be held liable under Title VII." *Id.* The

---

we just asked of her." (R. Doc. 132, Exh. 8, at 152). Mastin, on the other hand, refused to make appointments. The district court aptly summarized the situation: "And 'round and 'round they would go: Two employees, sitting ten feet from each other, tapping away on their keyboards, arguing about how they might meet." *Hervey*, 2006 WL 2990515, at *5.

district court also granted summary judgment in favor of the defendants on the retaliation claim, concluding that evidence of timing – that her adverse employment actions occurred within a short time of her engagement in protected activity – was insufficient to make out a *prima facie* case of retaliation. *Id.* at *16. Alternatively, even if temporal proximity were sufficient to establish a *prima facie* case, the court held that Hervey provided no evidence on which a reasonable jury could rely to find that the defendants' explanations were pretextual. *Id.* The district court granted summary judgment in favor of the county on the MGDPA claim, because it found that Mastin had not acted within the scope of his employment when he disclosed the private data. *Id.* at *17.

II.

We first consider the district court's grant of summary judgment on the Title VII and MHRA claims, which are governed by the same standards. *See Wittenburg v. Am. Exp. Fin. Advisors, Inc.*, 464 F.3d 831, 842 n.16 (8th Cir. 2006). We review the district court's grant of summary judgment de novo, viewing the evidence and drawing all reasonable inferences in the light most favorable to Hervey, the nonmoving party. *Holland v. Sam's Club,* 487 F.3d 641, 643 (8th Cir. 2007). We will affirm if no genuine issue of material fact exists and the defendants are entitled to judgment as a matter of law. *Id.* But "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A.

Title VII and the MHRA prohibit discrimination against an employee, with respect to compensation, terms, conditions or privileges of employment, because of sex. 42 U.S.C. § 2000e-2(a)(1). Hervey presented no direct evidence of discrimination, so the district court analyzed her claim under the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Because the record has been fully developed in connection with the motion for summary judgment, however, we may now focus on the ultimate question of discrimination *vel non. See U.S. Postal Serv. Bd. of Governors v. Aiken,* 460 U.S. 711, 715 (1983); *Riser v. Target Corp.,* 458 F.3d 817, 820-21 (8th Cir. 2006); *Johnson v. Ready Mixed Concrete Co.,* 424 F.3d 806, 810 (8th Cir. 2005).

We consider first Hervey's allegation that she suffered an adverse employment action because of her sex. Hervey claims that Nelson and Mastin took away many of her major responsibilities, and suspended her twice without pay, because she is a woman. The defendants argue that these actions were taken because of Mastin's management style and Hervey's insubordination. Hervey does not dispute that Mastin had a different management style, but instead claims that Mastin never should have been managing her, because Nelson and Mastin cannot change the reporting structure without the approval of the county board. Hervey thus confuses a grievance about internal county management with a claim of discrimination. Whether or not Mastin should have been supervising Hervey, she has no claim under Title VII unless the actions of Mastin or Nelson were based on sex. We see nothing about the

alleged lack of authority to change the management structure that supports an inference that subsequent actions taken by the new management team were based on sex.

Hervey also points to Mastin's numerous comments that the jail administrator position was unnecessary as evidence of sex discrimination. She highlights Mastin's comment that "the boys in blue" (referring to the sheriff's deputies) and the "boys in brown" (referring to the corrections officers) "do not think that the position of jail administrator is needed." That Mastin reported that male employees thought the position unnecessary, however, does not support an inference that Mastin acted based on Hervey's sex. It is undisputed that the county was suffering budget difficulties, and that the sheriff's office operated for many years without a jail administrator. In any event, a single comment that merely references gender is not sufficient to create a genuine issue of material fact of sex discrimination. *See Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 809-10 (8th Cir. 2007).

Hervey argues that the defendants' claim that she was insubordinate is a pretext for adverse employment actions based on sex. Nelson and Mastin suspended Hervey twice without pay for acts of insubordination, including her failure to meet with Mastin on a daily basis as directed. Hervey first argues that Mastin's insistence on meeting every day, without scheduling an appointment, was designed to cause failure. She also claims that a jury could find that Nelson directed and encouraged Mastin to be uncooperative in scheduling meetings. She cites testimony of the former undersheriff that scheduling meetings was possible. It may be that Hervey is right

and Mastin is wrong – that scheduling a meeting time each day would have been more efficient. But "[e]mployers are free to make employment decisions based upon mistaken evaluations, personal conflicts between employees, or even unsound business practices." *Edmund v. MidAmerican Energy Co.*, 299 F.3d 679, 685-86 (8th Cir. 2002) (internal quotations omitted). Hervey has not produced evidence that the personnel actions taken against her were based on sex, rather than on an effort to implement a management directive, whether that directive was sound or unsound as a business practice.

Hervey also claims that similarly-situated male employees were not punished as severely for their misconduct, and that this differential treatment establishes a submissible case of discrimination based on sex. To prove discrimination based on similarly-situated persons of another sex, however, "the individuals used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *Clark v. Runyon,* 218 F.3d 915, 918 (8th Cir. 2000). Hervey cites two employees that she claims were not punished for similar acts of misconduct: Mastin, and Mastin's step-son, a part-time deputy.

Hervey argues that Sheriff Nelson learned recently that, in 1980, Mastin lied on his application to become a licensed police officer by stating that he had not been convicted of a felony. Hervey claims that Mastin was not suspended for this falsehood, while she was reprimanded for lying to Mastin about leaving a voicemail on his telephone. A comparison of these two incidents does not support an inference of

sex discrimination. Even assuming Mastin was not disciplined at all when Nelson learned of the 1980 statement, the two circumstances are substantially different. Hervey was sanctioned for lying to her current supervisor in a manner that was insubordinate; Mastin's falsehood occurred more than twenty-five years ago. The differential treatment of these two dissimilar incidents does not support an inference of sex discrimination.

Hervey also claims that Mastin was not disciplined for mishandling a disciplinary hearing with another employee, while she was disciplined for a similar incident. This allegation is based on an affidavit of a former employee who claims that Mastin failed to provide union representation for the employee during a disciplinary meeting. Hervey has produced no evidence, however, that this incident was reported to the sheriff or anyone else with supervisory authority over Mastin. Without such evidence, there is no showing that supervisors treated Mastin and Hervey differently for an allegedly similar infraction.

Hervey next contends that Mastin's collective violations of department policy over his career are more serious than her acts of insubordination, but that Mastin has never been suspended without pay. In addition to the allegations above, Hervey claims that Mastin violated department policy when he was involved in domestic disputes, and recently violated Minnesota law by giving his step-son a transcript of a meeting between Mastin and Hervey that was prepared in contemplation of this litigation. The focus of our inquiry, however, is whether other employees were treated differently despite committing the same violations as Hervey: whether they were "involved in

or accused of the *same offense* and [were] disciplined in different ways." *Riser,* 458 F.3d at 821 (internal quotation omitted) (emphasis added); *see also Clark,* 218 F.3d at 918. Mastin's off-duty misconduct and other incidents dating to 1980 are not the same as Hervey's recent insubordination while on the job. That the two sets of behavior were treated differently does not support an inference of sex discrimination. As to Mastin's step-son, Richard Mastin, Hervey claims that the department's failure to discipline him for driving while intoxicated shows that management disciplined her based on sex. Again, however, this off-duty misconduct by Richard Mastin is not an offense that is the same or similar to Hervey's insubordination, so the two employees are not similarly situated in all relevant respects for purposes of disparate treatment analysis.

Among a host of other assertions, Hervey also cites her poor performance evaluation, and the requirement that she act as a corrections officer for two hours each day. In each instance, however, Hervey failed to produce evidence linking these actions to sex discrimination. We thus agree with the district court that summary judgment was appropriate on Hervey's disparate treatment claim of sexual harassment.

B.

Hervey next claims that the defendants discriminated against her based on sex by creating a hostile work environment. To establish even a prima facie case of sex discrimination on this theory, Hervey was required to demonstrate that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4)

the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment and failed to take proper remedial action. *Nitsche v. CEO of Osage Valley Elec. Co-op*, 446 F.3d 841, 845 (8th Cir. 2006). We agree with the district court that Hervey failed to establish a submissible case of a hostile work environment, because she did not produce evidence that the alleged harassment was based on sex.

Hervey claims that Nelson and Mastin created a hostile work environment by, among other things, constantly criticizing her, requiring her to report to Mastin, and yelling at her on several occasions. As an example, Hervey cites to Nelson's comment that she made him "so damn mad." Even if we assume that Nelson and Mastin's actions were abusive, Hervey must "prove that she was the target of harassment because of her sex and that the offensive behavior was not merely non-actionable, vulgar behavior." *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005). This distinction is important because "Title VII does not prohibit all verbal or physical harassment in the workplace and is not a general civility code for the American workplace." *Id.* (internal quotations omitted). Hervey has failed to produce such evidence. She simply recites a list of actions that Nelson and Mastin took against her, and claims they were taken because she is a woman. There is insufficient evidence to support an inference of discrimination. *See Joens v. John Morrell & Co.*, 354 F.3d 938, 941-42 (8th Cir. 2004).

C.

Hervey's final discrimination claim is that the defendants retaliated against her based on protected

activity. Federal law prohibits an employer from discriminating against an employee who "has opposed any practice" made unlawful by Title VII, or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" under the statute. 42 U.S.C. § 2000e-3(a); *see Barker v. Missouri Dept. of Corrections,* 513 F.3d 831, 834 (8th Cir. 2008). To establish even a *prima facie* case of retaliation, Hervey must demonstrate that (1) she engaged in statutorily protected conduct; (2) reasonable employees would have found the challenged retaliatory action materially adverse; and (3) the materially adverse action was causally linked to the protected conduct. *Weger v. City of Ladue,* 500 F.3d 710, 726 (8th Cir. 2007). An employee must show that the employer had actual or constructive knowledge of the protected activity in order to establish unlawful retaliation. *Buettner v. Arch Coal Sales Co., Inc.,* 216 F.3d 707, 715 (8th Cir. 2000). A materially adverse action is one that would have "dissuaded a reasonable worker from making or supporting a claim of discrimination." *Burlington N. & Santa Fe R. Co. v. White,* 126 S. Ct. 2405, 2415 (2006) (internal quotation omitted). Once again, because the record is fully developed, we need not proceed through each step of the *McDonnell Douglas* burden-shifting framework, but may consider whether Hervey has provided sufficient evidence of retaliation to create a submissible case. *See Riser,* 458 F.3d at 821. The plaintiff in a retaliation case must present sufficient evidence for a reasonable jury to conclude that her protected conduct was a determinative factor in a materially adverse employment action taken by the employer. *Van Horn v. Best Buy Stores, L.P.,* No. 07-2677, 2008 WL

2151692, at *3 (8th Cir. May 23, 2008); *Carrington v. City of Des Moines*, 481 F.3d 1046, 1053 (8th Cir. 2007).

Hervey claims that she engaged in protected conduct for the first time on April 11, 2003, when she met with Nelson, Mastin, and Byman to discuss the new chain of command. In response to Nelson's comments to Hervey that an e-mail she sent had made him "so damn mad," and that she was "disrespectful," Hervey told Nelson that he was violating the county's respectful workplace policy. The Koochiching County Respectful Workplace Policy prohibits acts of discrimination, but also addresses "rudeness," "angry outbursts," and "disrespectful language," whether or not such actions relate to a protected class. Hervey gave Nelson no indication that the "respectful workplace issues" to which she referred concerned anything more than what she perceived to be rude or angry comments that were inconsistent with the respectful workplace policy. Therefore, we conclude that Nelson and Mastin did not have actual or constructive knowledge of protected activity by Hervey as of April 2003.

Hervey did engage in protected conduct on February 12, 2004, when she told Mastin that she had filed a claim with the Minnesota Department of Human Rights, and thereafter when she participated in the processing of her complaint. Hervey claims that Nelson and Mastin retaliated against her several times, including (1) when Mastin said on February 12 that he would recommend to Nelson that Hervey wear a brown shirt to work because she was no longer a supervisor, (2) two weeks later, when Nelson and Mastin documented an oral warning for failing properly to gain approval for leave, and being

untruthful with her supervisor about a request for time off, and (3) in March and July 2005, when Hervey was suspended for insubordinate conduct.

To establish that these actions were retaliatory, Hervey relies principally on the timing of her protected activity and subsequent discipline. Generally, however, "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc). The wisdom of this rule is evident in a case such as this, where the employee was accused of insubordination *before* she notified the employer of her protected activity. Insubordinate employees may not insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action. "Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002). *See also Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.").

On February 12, 2004, Mastin summoned Hervey to his office to address her recent absences. Mastin accused Hervey of taking leave without notifying her supervisor and of lying about leaving him a voicemail *before* Hervey disclosed that she intended to file a discrimination claim. Before the meeting ended, Mastin told Hervey that he would

recommend to the sheriff, based on events that occurred well before Hervey engaged in protected activity, that she wear a brown shirt to work because she was no longer a supervisor. Assuming for the sake of argument that Mastin's statement that he would make such a recommendation is a materially adverse action, *but cf. Somoza v. Univ. of Denver*, 513 F.3d 1206, 1215 (10th Cir. 2008), or that Mastin unilaterally demoted Hervey in the meeting while advising her that his recommendation to the sheriff would address only what color shirt she should wear, the action was a logical consequence of Hervey's pre-existing disciplinary problems, and Hervey cannot create a submissible case of unlawful retaliation by interjecting her announcement of a discrimination claim in the middle of a previously scheduled meeting to discuss her absences from work. *See Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 916 (8th Cir. 2006) ("[T]iming alone is insufficient to show a pretextual motive rebutting a legitimate, non-discriminatory reason for an adverse employment action."). The same goes for the written warning on March 2, 2004; this memorandum simply documented criticisms that Mastin made of Hervey *before* she announced her protected activity. The later suspensions in March and July 2005 were premised on additional insubordinate acts and inadequate performance by Hervey. The mere fact that her discrimination claim was proceeding at the same time is insufficient to create a reasonable inference of retaliation. We reiterate that "antidiscrimination statutes do not insulate an employee from discipline for violating the employer's rules or disrupting the workplace." *Kiel*, 169 F.3d at 1136.

While professing to agree that "generally more

than a temporal connection is needed" to make a submissible case of unlawful retaliation, *post,* at 21, the dissent proceeds in the next breath to argue that Hervey has indeed established a submissible case based merely on a temporal connection. Hervey is entitled to a jury trial on whether her February 12 "demotion" was due to her filing a complaint of discrimination, it is said, because there is no evidence that "Mastin planned on disciplining Hervey for improperly taking leave before Hervey told Mastin that she would be filing a complaint against him." *Post,* at 23.[3] But the only evidence to which the dissent points in support of this retaliation claim is that which is generally insufficient – temporal proximity. That is, the dissent relies solely on the fact that Hervey disclosed the complaint to Mastin moments *after* Mastin accused her of taking leave without providing advance notice and lying about whether she notified Mastin by voicemail, but moments *before* Mastin told Hervey the consequences of her misconduct. This is insufficient evidence to create a submissible claim of unlawful retaliation. *Green,* 459 F.3d at 916. The defendant does not bear the burden to show that he already intended to administer discipline before the plaintiff interjected protected activity; the burden of persuasion is on the plaintiff to show that more than temporal proximity supports her claim that the employer's legitimate explanation is a pretext for unlawful retaliation. *Id.*

---

[3] As noted, when Mastin wrote to Nelson to recommend that Hervey be directed to cease wearing the white shirt of a supervisor, the six reasons he cited did not include her improper taking of leave. (Hervey App. 173). The sixth reason cited was Hervey's *untruthfulness* with her supervisor when asked a direct question about her absence from work. *(Id.)*

Beyond temporal proximity, we agree with the district court that the record does not support a reasonable inference of retaliation for protected activity. Hervey asserts that Mastin was untruthful in claiming in February 2004 that she dissembled about leaving him a telephone message concerning her intention to take leave. But even if Mastin concocted his version of the voicemail incident, Mastin did so *before* Hervey advised him of her protected activity, so a dispute about Mastin's truthfulness regarding *the voicemail* does not support a reasonable inference of retaliatory motive *for the discipline*. *See Smith*, 302 F.3d at 834. The dissent argues that there is evidence to support a retaliatory motive for the written warning placed in Hervey's file on March 2, 2004, because Hervey disputed whether she violated the office leave policy, and because Mastin conceded that he retroactively granted leave "all the time." Assuming the placement of this documentation in Hervey's file is a materially adverse employment action, *but cf. Devin v. Schwan's Home Serv., Inc.*, 491 F.3d 778, 786 (8th Cir. 2007), the evidence does not support an inference of retaliatory motive for the warning. Whatever Mastin's practice regarding retroactive approval of leave, Hervey was warned based on a combination of occurrences: her failure to comply with the leave policy *and* her false statements to Mastin in trying to justify her absence. She has not produced evidence that Mastin refrained from imposing discipline "all the time," or *any* time, under this confluence of circumstances. Evidence that Mastin declined to warn or discipline other employees under different circumstances does not satisfy Hervey's burden to present proof that she was treated differently from

other employees who were similarly situated in all relevant respects. *See Phillips v. Union Pac. R. Co.*, 216 F.3d 703, 707 (8th Cir. 2000).[4]

Hervey also disagrees with Mastin's assessment of her insubordinate behavior and poor performance, but her evidence must do more than raise doubts about the wisdom and fairness of the supervisor's opinions and actions. It must create a real issue as to the genuineness of the supervisor's perceptions and beliefs. *See Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000); *Edmund v. MidAmerican Energy Co.*, 299 F.3d 679, 685-86 (8th Cir. 2002). The dissent says there is such an issue with respect to the July 2005 suspension, because the manner in which the suspension was implemented – deactivating Hervey's cardkey and notifying staff of the suspension before notifying Hervey – was "humiliating." The strongest support the dissent can muster for this legal proposition is a *"Cf."* citation to a case involving an entirely different claim of hostile work environment. The dissent appears to mean that Nelson and Mastin deviated from some unspecified norm when they selected the manner of implementing Hervey's suspension. We do

---

[4] The dissent further asserts that a warning to Hervey in June 2004 that she made improper use of a county credit card, (Hervey App. 169), is an example of "selective discipline." The credit card incident actually shows the opposite. Corrections officer Gary Loop was warned at the same time as Hervey for improper use of a credit card, precisely because the sheriff's office did *not* want to treat Hervey more harshly than other employees. The dissent points to no evidence that Nelson or Mastin declined to discipline other employees who made improper use of county credit cards to support its assertion that this was discipline that "only happens if Hervey is involved." *Post*, at 26.

not think it is self-evident, however, that a suspended employee must be granted unfettered access to a secure building until she is notified of her suspension from work at the building. And Hervey herself admitted that staff members were notified of the suspension for a legitimate reason, namely, to cover Hervey's work shifts during her suspension. (R. Doc. 125, Exh. B, at 219). Hervey does not assert that the staff notified her of the suspension in the first instance, or that staff members somehow acted to humiliate Hervey before she was notified of the suspension by her supervisors.

In any event, assuming that the manner of implementing Hervey's suspension may fairly be labeled "humiliating," that fact alone is not probative of retaliatory intent. The supervisors, after all, may have sought to embarrass Hervey because of her insubordination alone, or simply because they were mean-spirited. Neither Hervey nor the dissent points to evidence that Hervey was treated differently in these respects than another similarly-situated employee who was suspended but who had not filed a discrimination complaint. Hervey produced no evidence that any other employee subject to suspension without pay was permitted access to a secure facility through the use of a cardkey on the first day of the suspension. She has not presented evidence that staffing arrangements to account for other suspensions were delayed until after the suspensions formally began.[5]

---

[5] The dissent also suggests that our analysis "discounts" the breadth of evidence concerning temporal proximity, and "overlooks" Hervey's supporting evidence, but much of the evidence recounted by the dissent is overstated or simply not supportive of her claim. The dissent recounts, for example, that

We do not gainsay the importance of the prohibition on retaliation to the proper functioning of the discrimination laws. An employer may not dissuade employees from invoking the protections of the civil rights laws by retaliating against those who bring discrimination to light. But the cause of action also should not be extended beyond its proper role into an unwarranted regulation of the employer-employee relationship. An employee in trouble with supervisors, and on the verge of disciplinary action, may not insulate herself from discipline by filing a claim of discrimination. Without our insistence that a claim of unlawful retaliation be bolstered by appreciable evidence beyond a temporal connection with the filing of a discrimination claim, an employer seeking to address the problem of underperforming employees could be paralyzed by the fear (or reality) of retaliation lawsuits, and unable to manage its workforce. This analysis does not call for adverse inferences about an employee's motivation or for the limitation of retaliation claims to model employees,

---

on July 13, 2005, Hervey requested several vacation days "to attend depositions in this case," but that Mastin denied her request two days after the defendants' counsel received notice of the depositions. The dissent does not assert that Mastin acted with knowledge that a denial of leave would hinder Hervey's ability to prosecute her lawsuit, and Hervey acknowledges that when her counsel later notified Mastin that Hervey sought leave to attend depositions, (R. Doc. 133, Exh. 112), the leave was granted. (Hervey Br. 15-16). The dissent devotes another paragraph to a legal battle over documentation regarding Hervey's suspension, which culminated in the county's claim of attorney-client privilege with respect to any documentation not already disclosed to Hervey. We do not understand how invocation of an evidentiary privilege supports an inference of retaliatory intent.

cf. post, at 28 n.6, but rather implements a background rule, established in *Green,* 459 F.3d at 916, that defines timing alone as insufficient to support a reasonable inference of pretext and retaliatory motive. We think the general rule on temporal proximity is sound, and that it is properly applied in this case. Hervey has failed to produce sufficient evidence to support a reasonable inference of retaliatory motive on the part of her employer. We therefore agree with the district court that she has failed to show a genuine dispute for trial.

III.

Hervey's claim under the Minnesota Government Data Practices Act was before the district court based on supplemental jurisdiction under 28 U.S.C. § 1367(a). Because we conclude that the district court properly dismissed the federal claims, we remand the case with directions to modify the final judgment so as to dismiss the MGDPA claim without prejudice, so that it may be considered, if at all, by the courts of Minnesota. *See Birchem v. Knights of Columbus,* 116 F.3d 310, 314-15 (8th Cir.1997); *Ivy v. Kimbrough,* 115 F.3d 550, 552-53 (8th Cir.1997) ("In most cases, when federal and state claims are joined and the federal claims are dismissed on a motion for summary judgment, the pendent state claims are dismissed without prejudice to avoid needless decisions of state law . . . as a matter of comity and to promote justice between the parties.") (internal quotation and citation omitted).

* * *

For the foregoing reasons, we affirm the district court's judgment on the federal and state claims alleging discrimination and retaliation, and

we remand the case to the district court with directions to modify the final judgment so as to dismiss the claim under the Minnesota Government Data Practices Act without prejudice.

MELLOY, Circuit Judge, concurring in part and dissenting in part.

I concur in the portions of the majority opinion that affirm the district court's grant of summary judgment as to the sex discrimination claims (Sections II.A and II.B) and that dismiss without prejudice the Minnesota Government Data Practices Act claim (Section III). However, I respectfully dissent from the affirmance of the grant of summary judgment on the retaliation claim (Section II.C). I would find the district court erred by weighing the evidence of retaliation, resolving issues of disputed fact, and ruling as a matter of law that Florence Hervey did not suffer retaliation. The district court found that Hervey failed to establish the third element of a prima facie retaliation case: a causal nexus between the protected conduct and the adverse action. This finding was in error. "The plaintiff's burden at the prima facie case stage of the analysis is not onerous, and '[a] minimal evidentiary showing will satisfy this burden of production.'" Wallace v. DTG Operations, Inc., 442 F. 3d 1112, 1119 (8th Cir. 2006) (citation omitted).

The majority discounts the breadth of evidence regarding the temporal connection between Hervey's protected conduct and the adverse employment actions and overlooks Hervey's other supporting evidence. The majority looks at the adverse actions in isolation and fails to consider the totality of the

circumstances. See Sherpell v. Humnoke Sch. Dist. No. 5 of Lonoke County, Ark., 874 F.2d 536, 540 (8th Cir. 1989). While I agree with the majority's statement that generally more than a temporal connection is needed, evidence of temporal connection can be strong evidence of retaliatory intent in some cases. "Viewed within the context of the overall record, temporal proximity may directly support an inference of retaliation, and it may also affect the reasonableness of inferences drawn from other evidence." Wallace, 442 F.3d at 1122. Hervey provided strong evidence of timing and presented a submissible case that is also based on evidence other than temporal connection. "Where reasonable fact finders could extend an inference in favor of the non-moving party without resorting to speculation, we may not declare the inference unjustifiable simply because we might draw a different inference." Id. at 1118. The evidence here does "create a real issue as to the genuineness of the supervisor's perceptions and beliefs," ante at 18, and "support[s] a reasonable inference of retaliatory motive," ante at 20.

As the majority states, Hervey did not go to work February 10-11, 2004. Mastin called her on February 11 to find out why she had not been at work. He claimed that she lied about leaving a voicemail message for him, and he told her they would talk about it the next day. During their February 12 meeting regarding her alleged failure to follow protocol for requesting leave, Hervey told Mastin that she had contacted the Minnesota Department of Human Rights. Mastin responded that Hervey was no longer a supervisor, that he would recommend that Hervey wear a brown shirt (she wore a white shirt, signifying management status), and

that when Nelson returned, the three of them would meet. The majority states that "Mastin told Hervey that he would recommend . . . she wear [a different shirt] because she was no longer a supervisor." Ante at 15. Viewing Hervey's declaration in the light most favorable to her, Hervey stated that Mastin demoted her. This was a materially adverse action, and not merely a recommendation. Mastin told Hervey: "I will suggest to the sheriff that you report to work from now on in brown because you are no longer a supervisor." Even assuming that Mastin only recommended Hervey's demotion, however, an unexecuted recommendation can constitute an adverse employment action in combination with other retaliatory acts. See Phillips v. Collings, 256 F.3d 843, 849 (8th Cir. 2001) ("[The defendant] argues that her 'draft' evaluation of [the plaintiff], which was never in fact implemented, cannot constitute an adverse employment action because it did not have a tangible effect on his employment duties. While it is true that a draft evaluation alone could not be considered an adverse employment action, *we consider the cumulative effect of [the defendant's] discriminatory actions rather than determining whether any individual action upon which the claim relies was sufficiently adverse.*" (emphasis added)).

Significantly, no evidence cited by the defendants supports their argument that Mastin planned on disciplining Hervey for improperly taking leave before Hervey told Mastin that she would be filing a complaint against him. The district court states that "Mastin informed Hervey of his intention to discipline her before Hervey informed Mastin of her intention to file a complaint." However, the exhibit that the district court cites for support does

not support this statement. The exhibit merely states that Mastin said, "Well, stop in my office when you come to work tomorrow . . . [t]o discuss this issue." Culberth Decl. Ex. 89 at 16. All Mastin told Hervey on February 11 was that "when [Hervey] came into work the next day, he wanted to *talk* to [Hervey.]" Hervey App. 34 (emphasis added). Mastin said nothing about discipline or a demotion.

The majority's insistence that "there is no reasonable inference of a retaliatory motive" because "even if Mastin concocted his version of the voicemail incident, Mastin did so *before* Hervey advised him of her protected activity" is unjustified. Ante at 17. The majority points to no evidence establishing that Mastin definitively planned on disciplining Hervey prior to their meeting. The majority cites to notes that Mastin made in Hervey's personnel file about the February 12 meeting. The notes list six reasons for his recommendation that Hervey "continue as Jail Administrator with duties to be reviewed and discussed but wear the same uniform as the other correctional officers." Mastin, however, wrote the notes after the meeting, and there is no evidence tending to show he believed any of the reasons warranted discipline prior to Hervey's disclosure of her complaint. According to Hervey, Mastin did not discuss five of the six reasons listed on the note. Accepting Hervey's characterization of the meeting and viewing Mastin's notes in a light most favorable to Hervey, at least two reasonable inferences adverse to the defendants exist. First, Mastin disciplined Hervey solely for her untruthfulness, and because Hervey denies she was untruthful, a jury question exists as to whether the perceived untruthfulness was Mastin's true motivation for the discipline.

Second, Mastin retaliated against Hervey for filing the complaint and attempted to conceal his retaliatory motive by listing numerous, facially valid reasons for discipline in the notes.

Contrary to the majority's assertion that Mastin's "action was a logical consequence of Hervey's pre-existing disciplinary problems," ante at 16, his action was not logical because it was the first time that Hervey had been disciplined at all for her alleged insubordination and incompetence. Previously, she had only been given oral reprimands to follow directives and to improve her performance. The sudden demotion was unexpected and came "moments," ante at 17, after Hervey told him she was filing a complaint against Mastin. Further, the notes do not suggest that Mastin had made up his mind to strip Hervey of her supervisory role or to recommend that she not wear a supervisor uniform before Mastin and Hervey met on February 12. The notes are a reflection of his thoughts after the meeting and do not rebut the retaliatory inference. Taken in a light most favorable to Hervey, we may not assume that Mastin's calling of a meeting on February 12 shows a preexisting plan to discipline her. Thus, a material question of fact was raised as to whether Hervey's demotion was due to her failure to request leave properly and alleged lies, or due to Mastin's reasons listed in her personnel file, or due to her filing of the complaint.

On February 18, Mastin took Hervey's master key to the courthouse and replaced it with a key that only opened her office door. He also assumed some of her responsibilities: he posted a memo stating that he would approve all vacation and leave requests, office schedules, and memos regarding the agency. The

same day, Hervey alleged that her loss of supervisor status was retaliation by Mastin in a letter to the Koochiching County Attorney; she cited the taking of her key and her responsibilities as indications that the situation was worsening. On March 2, Mastin and Nelson called a meeting with Hervey regarding the events of February 10. They reprimanded her for her failure to properly request leave from Mastin before taking time off and for lying to Mastin regarding her request for time off. Mastin and Nelson stated that reoccurrences of these actions would result in discipline. However, Hervey disputes that she violated any procedure for taking time off, and Mastin admitted that he retroactively approved leave "all the time." Given the procedural posture of this case and our duty to view facts favorably to Hervey, we must assume that Hervey properly requested time off.

But even if we assume that she did not comply with the leave policy, a question of fact remains regarding whether Hervey alone was singled out for discipline for retaliatory purposes. See Wallace, 442 F.3d at 1123 ("Viewed in a light most favorable to [the plaintiff], a reasonable jury could find [her supervisor's] adverse and selective application of the policy to be evidence that his reliance on the policy was merely pretext to hide a retaliatory motive."). Although the majority tries to rebut the retaliatory inference regarding selective discipline, ante at 18, the majority and Phillips v. Union Pacific Railroad Co., 216 F.3d 703 (8th Cir. 2000), focus on the amount of evidence of disparate treatment necessary to support a finding of pretext. Phillips, 216 F.3d at 706. In doing so, the majority fails to take the facts in a light most favorable to Hervey, looks at the

evidence of disparate treatment as a series of isolated events, and fails to consider the totality of all of the evidence viewed in context. For example, beyond the fact that Hervey was disciplined in the first place, it is significant that she was severely disciplined for violating a policy that Mastin rarely upheld. Further, the majority discounts the gravity of inferences a jury might draw if the jury concludes Mastin concocted post-hoc rationales for his actions, as Hervey alleges regarding Mastin's six point memo.

On June 4, 2004, Hervey filed a notice of claim with the Koochiching County Auditor. A fax dated June 21 and addressed to Nelson contained a notice of a charge of discrimination filed with the EEOC. A week later, Mastin disciplined E911/Corrections Officer Gary Loop and Hervey for improper use of a county credit card. Nelson told Loop that Nelson did not want to discipline Loop, but that Nelson had to because of Hervey. Loop stated that "[Nelson] told me that he had been close to reconciling the conflict with Florence Hervey and her then attorney, Bruce Biggins, but that he had gotten angry about what had been said in trying to reconcile the conflict and that, in essence, 'no way was he going to do it now.'" This type of selective discipline—discipline only happens if Hervey is involved—again creates an inference of retaliatory intent towards Hervey. The majority disagrees, ante at 18 n.4, taking the opposite inference: that the incident shows the lack of selective discipline because Loop was also disciplined. But given our duty to resolve inferences in favor of Hervey, I must conclude that this incident shows retaliatory intent.

On July 13, 2005, Hervey requested several vacation days to attend depositions in this case.

Although she did not indicate the purpose for her request, the days she requested were the days that depositions, including those of Mastin and Nelson, were scheduled, and the defendants' counsel received notices of the depositions on July 8. Mastin denied Hervey's request two days later. On July 18, Hervey's current counsel wrote to the defendants' counsel regarding the denial and stated that Hervey timely submitted the request and ensured her shifts were covered and that Hervey was unaware of any other such denials of vacation requests by Mastin. Mastin later approved the request without any explanation. A few days after Hervey's counsel's letter, Mastin and Nelson issued a final notice that unless Hervey's performance immediately improved, she would be terminated. They suspended her without pay for fifteen days for failing to meet daily with Mastin and failing to meet job expectations, citing sixteen specific examples. They also notified her staff of the suspension before notifying her and deactivated her card key such that she could not let herself into the building that morning. The adverse employment actions occurred close in time to the depositions, but even more significant is the humiliating way the actions were carried out: she was the last to know and had to be let into the building she used to run. The humiliation creates a stronger inference of retaliation than the discipline alone. Cf. Brannum v. Mo. Dep't of Corr., 518 F.3d 542, 548 (8th Cir. 2008) ("Rather, whether a work environment is so hostile or abusive as to alter the terms and conditions of employment is to be judged in light of *all* the circumstances, including . . . whether it is . . . humiliating . . . ." (quotation omitted)); Swain v. Spinney, 117 F.3d 1, 8 (1st Cir.

1997) (holding there was a "distinct possibility" in a § 1983 action that the strip search and accompanying sexual humiliation was in retaliation for the individual's non-cooperation and noting the possibility that the search was merely a pretext to humiliate).

The majority's response to the retaliatory inference drawn from the humiliation falls short. The majority comments that Hervey's supervisors may have wanted "to embarrass Hervey because of her insubordination alone, or simply because they were mean-spirited," but this comment is a result of drawing an inference against Hervey, which should not be done at the summary judgment stage.

On August 17, 2005, Hervey met with Mastin and Nelson regarding the suspension. Hervey again requested documentation (she had asked for documentation twice during her suspension) supporting the allegations listed in the suspension letter because she did not understand why she had been suspended. Mastin and Nelson refused, stating that the attorneys wrote the letter and had all the documentation. After ten months and at least one motion to compel, the defendants responded to Hervey's request for documentation on May 17, 2006. They claimed attorney-client privilege and stated that Hervey already had the other listed documents. While the majority sees nothing wrong with this discovery dispute, ante at 19 n.5, I think it is significant that it took ten months and judicial intervention before the defendants could respond that they were not producing any additional documents at all. Hervey notes that she never refused to meet with Mastin, and a January 6, 2005, directive stated that she must meet with Mastin

every day "unless there is a reasonable cause not to." Hervey argues that she had reasonable cause—either her or Mastin's schedule did not permit a meeting—on each occasion that she failed to meet with Mastin.

The timing of the adverse employment actions—each shortly after developments in the litigation—is important in this case. I believe that the timing and other evidence in this case strongly support an inference of causation for the purpose of the prima facie case. Additionally, this same evidence raises material questions of fact as to whether the defendants' legitimate, nondiscriminatory reasons for the adverse employment actions were pretext. The majority and I argue back and forth on the inferences that should or can be drawn from the facts.[6] When genuine issues of

---

[6] In particular, the majority emphasizes the need to protect employers from unscrupulous employees who interject allegations of discrimination or retaliation as shields to "insulate themselves from discipline" after becoming cognizant of their disfavored status in the workplace. Ante at 15. I note two difficulties with undue reliance on this line of reasoning. First, while it is important to point out that this strongly voiced and commonly repeated suspicion of employees' motives may be an important consideration, it is also important to point out that this characterization of employees is difficult to support at the summary judgment stage. It requires courts to make strong *adverse* inferences about the employees' states of mind. In general, I do not believe it is appropriate, at the summary judgment stage, to ascribe such manipulative motives to employees. Second, just as an instance of protected conduct by an employee should not be viewed as an impenetrable shield against future discipline by an employer, the existence of a blemished work record, or an employee's pre-existing status as a less-than-ideal-employee, should not be used as a rug under which employers and courts may sweep claims of retaliation.

fact exist, summary judgment is not appropriate. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Our disputes illustrate that the jury needs to decide this issue. For these reasons, the summary judgment on the retaliation claim should be reversed and remanded for trial.

Our laws against discrimination and retaliation are not in place merely to protect employees with otherwise unblemished records, and we must guard against the establishment of standards that deprive all but the most deserving employees of jury trials. While I share the majority's concern that some employees may attempt to "work the system" by taking protected actions when they believe discipline is imminent, we should not support granting summary judgment based in large part on suspicions of employees' motives.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FLORENCE HERVEY, Plaintiff,

v.

COUNTY OF KOOCHICHING, SHERIFF DUANE NELSON, individually and in his official capacity, and UNDERSHERIFF JOHN MASTIN, individually and in his official capacity, Defendants.

Civil No. 04-4537 (PJS/RLE)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Celeste Culberth, CULBERTH & LIENEMANN, LLP, 1050 Piper Jaffray Plaza, 444 Cedar Street, Saint Paul, MN 55101, for plaintiff.

Ann Goering, RATWIK, ROSZAK & MALONEY, PA, 730 Second Avenue South, Suite 300, Minneapolis, MN 55402, for defendants.

Florence Hervey was hired as a deputy jail dispatcher by the Koochiching County Sheriff's Department in 1976. She served an uneventful 25 years in that position. In 2001, she was promoted to the newly created position of "jail administrator." Initially, Hervey reported directly to Sheriff Duane Nelson, the head of the Department. The undersheriff at that time— Robert Byman — was the second-ranking employee of the Department. But, by all accounts, Byman was a hands-off administrator, and he did not object to Hervey exercising almost complete authority over the jail and reporting directly

to Nelson.

Hervey worked with Nelson and Byman for two years without incident. Byman then announced his retirement and, in 2003, Nelson appointed John Mastin to replace him. Mastin was, by all accounts, a hands-on administrator — the opposite of Byman. Mastin wanted all of the Department's employees (including Hervey) to report through him to the sheriff. Nelson agreed and directed Hervey to report to Mastin.

This decision touched off a feud between Hervey on the one hand and Nelson and Mastin on the other — a feud that is now well into its fourth year. Hervey was incensed that she was asked to report to Mastin, whom she considered to be her peer, not her superior. Beginning almost from the moment that Nelson's decision was announced, Hervey has found many ways (direct and indirect, passive-aggressive and aggressive-aggressive) to let Nelson and Mastin know of her unhappiness — actions that Nelson and Mastin regard as insubordinate and as sometimes contrary to Departmental policies. Nelson and Mastin have grown increasingly exasperated with Hervey, and they have expressed their exasperation in many ways, from raising their voices to suspending Hervey without pay — actions that Hervey regards as discriminatory or retaliatory. Each allegedly wrongful act of Nelson or Mastin has, in turn, spurred Hervey on to further allegedly wrongful acts of her own, and each allegedly wrongful act of Hervey has spurred Nelson and Mastin on to further allegedly wrongful acts of their own. And on and on the feud has gone.

The feud has also given rise to this lawsuit. Hervey has sued Nelson, Mastin, and

Koochiching County under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq. ("Title VII") for sex discrimination, for creating a hostile work environment, and for retaliation.[1]

Hervey also alleges that Koochiching County is liable for violations of the Minnesota Government Data Practices Act ("MGDPA") allegedly committed by Mastin. The defendants have moved for summary judgment.

I. BACKGROUND

Koochiching County did not have a jail administrator until 2001. Before then, the sheriff and undersheriff ran the jail — scheduling corrections officers' shifts, transporting prisoners, ordering supplies, and making sure that the jail complied with all legal standards. Nelson Dep. 9-11. After Nelson was elected sheriff in 1999,[2] he quickly determined that he could not tackle all of his other duties while running the jail. He asked the Koochiching County Board to add the position of jail administrator to his staff. Nelson Dep. 9, 14-16. The Board eventually agreed. Culberth Decl. Ex. 30.

Hervey and four others applied for the new

---

[1] Hervey has brought identical claims under the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.08. Claims under the MHRA are analyzed under the same standards as claims under Title VII. *See Conquist v. City of Minneapolis*, 237 F.3d 920, 926 (8th Cir. 2001) (applying federal analysis to MHRA sex discrimination claims); *Scott v. County of Ramsey*, 180 F.3d 913, 917 (8th Cir. 1999) (applying federal analysis to retaliation claims under MHRA). For that reason, this opinion will refer only to the federal claims.

[2] Nelson retired on December 31, 2005. For the purposes of this opinion, though, he will sometimes be referred to as though he were still serving as sheriff.

position. Hervey Dep. 11-12. The candidates were interviewed by a subcommittee of the Koochiching County Board. Hervey Dep. 11-12. The subcommittee recommended Hervey, and Nelson accepted the recommendation. Nelson Dep. 71-73; Jaksa Dep. 122. Hervey assumed her new responsibilities on February 12, 2001. Hervey Dep. 15.

Hervey did well. She kept the E/911 corrections officers on schedule, wrote new policies for the jail, updated the sheriff's office manual, and brought the jail into compliance with all state and local standards. Hervey Dep. 16-20; Carlson Dep. 44. By 2003, Sheriff Nelson was calling Hervey a "godsend," Congrave Dep. 54, and a state inspector wrote in a report that "Hervey is one of the most organized and efficient jail administrators that I have had an opportunity to deal with," Culberth Aff. Ex. 21 at 39 (Koochiching County Facility Inspection Report).

Hervey enjoyed a great deal of autonomy. Nelson Dep. 74. Nelson and Byman (the undersheriff) took a hands-off approach, giving Hervey the freedom to run the jail pretty much as she saw fit. Nelson Dep. 77. Hervey reported directly to Nelson and had little interaction with Byman. Nelson Dep. 74-76; Byman Dep. 59-61. Even during this period of calm before the storm, though, it was clear that Hervey cared deeply about where she ranked in the pecking order. Her one major disagreement with Byman during this period was a dispute over who was "second in line" and responsible for overseeing the jail in the sheriff's absence. Nelson Dep. 82, 88.

In the spring of 2003, Byman announced his retirement, and Nelson appointed Mastin to replace him. Nelson Dep. 84. Mastin was a very different person from his predecessor. Most important for

purposes of this litigation, Mastin was much more controlling than Byman — as "hands on" as Byman was "hands off." Even before taking office on May 1, 2003, Mastin pressed Nelson to change reporting lines in the Sheriff's Department. Nelson Dep. 87-88. Nelson agreed that all employees of the Department — including Hervey — would report through Mastin. Nelson Dep. 89-90; Congrave Dep. 54. This change and several others were announced at a staff meeting on April 3, 2003. Culberth Decl. Ex. 57 at 4-5.

Hervey was not able to attend that meeting. Hervey Dep. 42-43. She did, however, receive a copy of the minutes of the meeting, as well as a copy of the revised reporting structure for the Sheriff's Department that had been distributed at the meeting. Culberth Decl. Ex. 57; Hervey Dep. 42-43. She was appalled to learn that she would now be reporting to Mastin. She considered herself a peer of the undersheriff — not his underling — and she felt that being required to report to the undersheriff was a major and undeserved demotion. Hervey Dep. 43-44.

On April 9, 2003, Hervey sent an e-mail to Nelson — an e-mail that could charitably be called snippy — asking whether Nelson was aware that he, and not the undersheriff, was her direct supervisor. Culberth Decl. Ex. 89 at J. Hervey referred Nelson to her job description and to an organizational chart in a County manual, and Hervey told Nelson that he did not have the authority to change her reporting line without the approval of the County Board. *Id.*

On April 11, 2003, Nelson called a meeting with Hervey, the outgoing Byman, and the incoming Mastin. Culberth Decl. Ex. 58. Hervey again said that she would not report to Mastin and again asserted

that Nelson could not change her reporting line. Supp. Hervey Decl. Ex. B at Bates Nos. H 1317-20. Nelson disagreed, arguing that, as the duly elected sheriff of Koochiching County, he had the authority to organize his own department. Nelson Dep. 90. Tempers rose, and eventually Nelson and Hervey were shouting. Nelson Dep. 91. Mastin and Byman left the room. After talking further, Nelson tried to calm Hervey by giving her a hug and asking if Mastin would be a problem for her. Nelson Dep. 91.

As noted, Nelson had hired Hervey and thought highly of Hervey, and the two had worked together well for many years — dating to long before Nelson was elected sheriff. Nelson Dep. 9; Congrave Dep. 54-55. In all that time, they had never had a fight like the one caused by Nelson's decision to ask Hervey to report to Mastin, Nelson Dep. 92, and by Hervey's determination that "she would not go willingly," Pl.'s Resp. Mem. 51. Even today Hervey continues to dispute that the sheriff has the authority to determine the reporting lines in his own department. *See id.* at 16 n.6; Hervey Dep. 41.

The relationship between Hervey, Nelson, and Mastin continued to deteriorate over the ensuing months and years — a deterioration recorded in painstaking detail by Hervey, who is an inveterate e-mailer and note-taker. The record in this case contains thousands of pages of documents detailing incidents between Hervey and Nelson, Hervey and Mastin, Mastin and jail dispatchers, Hervey and jail dispatchers, Hervey and the support staff, and so on. Only a few of the most significant incidents will be recounted below, organized roughly by the legal claims to which they most closely relate.

A. Sex Discrimination

"Exhibit A" in Hervey's litany of complaints has always been Nelson's decision in April 2003 to ask her to report to Mastin. Hervey regarded this as a "demotion," and she cites it as the first of many acts of sex discrimination that she has suffered. Pl.'s Resp. Mem. 16; Culberth Decl. Ex. 89 at K. It should be noted, though, that although Hervey complained early and often about her "demotion," it was not until February 2004 — almost a year later — that Hervey alleged that Nelson had demoted her because she was a woman. Culberth Decl. 89 (Respectful Workplace Complaint). This, of course, is the same Nelson who had hired Hervey two years earlier over male competitors, who had praised Hervey as a "godsend," who had let Hervey run the jail pretty much as she saw fit, and who, as will be described below, fought to save Hervey's job from elimination.

Mastin's appointment as undersheriff was announced in the spring of 2003. Nelson Dep. 84. The State of Minnesota was then struggling to bring a huge deficit under control, and counties and cities were bearing the brunt of the budget cutting. Koochiching County needed to make drastic cuts to its budget, and it asked its department heads — such as Nelson — to identify expenses that could be eliminated. Mastin Dep. 293; Jaksa Dep. 172. Nelson asked Mastin to help him to find savings in the budget for the Sheriff's Department, including the budget for the jail. Mastin Dep. 293. Mastin, in turn, asked Hervey to identify cuts that could be made in the jail's budget. Hervey Dep. 81. Hervey refused to do so. Instead, Hervey insisted that she could not cut one dime out of her budget, Hervey Dep. 83 — a

facially implausible claim that may have been motivated more by hostility to Mastin than by economic reality.

Indeed, Hervey went even further. Not only did she refuse to find savings in the jail's budget, but she had earlier gone over Nelson's and Mastin's heads to the County Board and asked that her budget be *increased* by adding two positions for corrections officers. Hervey Dep. 81-82. She did not clear this letter in advance with either of her supervisors. Needless to say, Nelson and Mastin were not pleased with either Hervey's refusal to help reduce the jail's budget or her going over their heads to ask the County Board for a budget increase.

The budget crisis also meant that many County employees had to assume additional duties. For example, Nelson and Mastin agreed to take the shifts of deputy sheriffs in order to reduce the need to spend money on part-time deputies. Mastin Dep. 132. Nelson and Mastin asked Hervey to take on additional duties as well — in particular, to work two hours every morning (from 8:00 a.m. to 10:00 a.m.) as a corrections officer, the job that she held before becoming jail administrator. Mastin Dep. 128-29. Hervey accepted the additional duties, but she did so grudgingly. She felt personally insulted by Mastin and believed that her authority as jail administrator was being undermined by the part-time duties, Hervey Dep. 48-49, especially given that Mastin told Hervey that she could not be the jail administrator during the two hours that she worked as a corrections officer, Nelson Dep. 163. Hervey now asserts that, although many Koochiching County employees (male and female) were asked to work harder to meet the budget crisis, the request to her was motivated by the

fact that she was a woman.

Ironically, one of the persons responsible for this alleged discrimination — Nelson— was at the same time fighting to save Hervey's job. The County Board was under a great deal of pressure to find budget savings, and some members of the Board targeted Hervey's position. The County had survived without a jail administrator until 2001, and some Board members felt that the County could survive without a jail administrator again. Jaksa Dep. 172-73. But Nelson successfully worked to save Hervey's job. Jaksa Dep. 173.

The budget crisis affected Hervey and other County employees in additional ways. For example, late in 2003, Hervey was told that she must get Mastin's approval for all purchases for the jail exceeding $100. Mastin Dep. 293; Hervey Dep. 55.[3] At the time, Hervey saw this as another attempt to undermine her authority. Now she sees it as also being motivated by the fact that she is a woman. Hervey Dep. 53. Mastin has a different explanation: "The county board directed everything over $1,000 would go to the county board, and anything over a hundred had to be authorized by the agency head." Mastin Dep. 293. Mastin was to be the "agency head regarding jail administration," and thus Hervey would need to run purchases by him. Mastin Dep. 293.

Another battleground between Mastin and Hervey — and this may be the biggest one, next to the question of the reporting lines — involved

---

[3] Hervey claims that at "some point after that [she] was told that [she] needed to have permission for everything [she] order[ed] no matter what the cost was." Hervey Dep. 55.

Mastin's request that Hervey check in with him each day after completing her two-hour shift as a corrections officer. Mastin Dep. 295. Nelson and Mastin managed to meet every day, and both thought it would be helpful for Mastin and Hervey to do likewise. Nelson Dep. 151; Mastin Dep. 294-95. Mastin asked Hervey to simply "find him" at some point every day. Hervey, though, insisted on making appointments. Mastin Dep. 295. Mastin did not want to make appointments; he just wanted Hervey to stick her head in his office, which was about ten feet away from Hervey's office.

Day after day, Mastin and Hervey battled over whether and how they would meet. A typical exchange would go something like this: Hervey would e-mail her daily schedule to Mastin and ask to schedule an appointment. Mastin would e-mail back and ask Hervey to just "stop by." Hervey would reply by e-mail and again insist on an appointment. Mastin would reply by e-mail and again insist that Hervey simply "find him" when she was free. And 'round and 'round they would go: Two employees, sitting ten feet from each other, tapping away on their keyboards, arguing about how they might meet. Often the day would end without the two actually meeting.[4] *See, e.g,* Supp. Hervey Decl. Exs. Bates No. H 1262-63, 1368-69, 1382-83.

Yet another battleground between Mastin and Hervey involved the issue of employee evaluations. Mastin's predecessor had been so "hands off" as an

---

[4] Nelson summarized the absurdity of this conflict: "They're 10 feet apart . . . if they can't meet, [if] she can't meet with him, there's something wrong. She walks by his office, [if] he's in there, stop in. That's all I've asked of her." Nelson Dep. 160.

administrator that he had never conducted formal evaluations of the employees whom he supervised. Mastin Dep. 51-52. Mastin decided to change this policy. Mastin Dep. 51-52. Performance evaluations were not new to Hervey, as she routinely evaluated the staff that she supervised, but she balked at the notion of being evaluated by Mastin. Hervey felt it was "meaningless for [Mastin] to evaluate [her] job because he does not even know what [her] job is." Hervey Dep. 124.

Mastin nevertheless evaluated Hervey on February 6, 2004. Culberth Decl. Ex. 89 at E. The evaluation indicated some of Hervey's strengths. For example, Mastin gave her a top grade of "5" in the area of "position knowledge" (noting that she is "[g]reat in this area"), as well as a "4" in "initiative"(noting that she "is always willing to accept responsibility and eager to learn new methods for tasks"). *Id.* The evaluation also discussed some of Hervey's perceived weaknesses. For example, Mastin gave her a "1" in "teamwork" (noting that she needs to "[b]ecome a team player for the whole of the Sheriff's Office, not just corrections"). *Id.*

In claiming that Nelson and Mastin discriminated against her, Hervey cites all of these things — her being required to report to Mastin, her being asked to cut her budget, Nelson and Mastin being angry at her for going over their heads to the County Board, her being asked to work two hours each day as a corrections officer, her needing Mastin's approval for expenditures over $100, the constant fighting over the daily meetings, and the negative aspects of the evaluation that Mastin gave her. She also points to many other slights, too numerous to recount here.

B. Hostile Environment

Hervey accuses Nelson and Mastin of creating a hostile work environment — and thereby sexually harassing her. Hervey relies on the facts described above, as well as others. Mostly, Hervey focuses on the tone that Nelson and Mastin used when speaking to her.

Hervey alleges that Nelson and Mastin often spoke to her in an angry and demeaning way. Hervey cites as an example the April 11, 2003 meeting, at which, she alleges, Nelson yelled that he was "so damn mad" about Hervey's refusal to report to Mastin. Culberth Decl. Ex. 89 at J, K. Hervey states she "sat there for an hour and listened to him yell." Hervey Dep. 136.[5]

Hervey cites another example of Nelson and Mastin losing their tempers with her. In September 2003, Hervey became concerned about shotguns being present in squad cars while prisoners were being transported. Rather than discuss her concern with her supervisors— Nelson and Mastin — Hervey sent an e-mail directly to the County Attorney's Office, asking for a legal opinion about the practice. Hervey Dep. 135. Nelson and Mastin were furious that Hervey went over their heads to the County Attorney without simply asking them to take the shotguns out of the cars. Mastin Dep. 118. Mastin also viewed Hervey's contact with the County Attorney as

---

[5] For purposes of this summary judgment motion, the Court must assume that Hervey's version is true. It should be noted, though, that the Court has reviewed much of the voluminous correspondence between Nelson and Hervey, and the Court has been struck by Nelson's patience and civility. Nelson time and again refuses to take the bait; he instead responds calmly and politely to even the most pointed communications.

breaching an unwritten rule not to take intra-departmental disagreements outside of the Department. Mastin Dep. 54. Hervey claims that, during the discussion of her email to the County Attorney's Office, Nelson yelled at her, telling her over and over again that she did not respect anyone in the office. Hervey Dep. 135.

Angry exchanges between Nelson and Hervey, or between Mastin and Hervey, became common. The tension in the Sheriff's Department —- especially in the ten feet of territory between Hervey's door and Mastin's door — was palpable. Chris Raboin, the Chief of Police of International Falls, "was sandwiched between the two" and had to leave his office on at least one occasion because a conversation between Mastin and Hervey escalated into a heated disagreement. Raboin Dep. 26-27. He does not recall, however, that the arguments ever crossed the line to harassment or abuse. Raboin Dep. 27-28. The conversations instead "sounded like some arguing back and forth," but there was "nothing that really would alarm [Raboin] other than [not] want[ing] to hear any of it." Raboin Dep. 27-28.

Sergeant Brian Youso, who occupied the office on the other side of Mastin, was irritated with the volume in which Mastin conducted *all* of his conversations. Youso Dep. 36-37 ("[M]orning speaker phone conversations, messages left. . . [Mastin]'s got everything full blast. I can't — it's irritating, and I shut my door at times; at times I leave.") Youso did find some of Mastin's interactions with Hervey "demeaning," and felt that Mastin never understood how to communicate effectively with Hervey. Youso Dep. 36-37.

Mastin clearly had a strong personality and an

aggressive presence. He seemed to put many in the Sheriff's Department — male and female — on their guard. Raboin Dep. 33; Fults Decl. ¶ 6, 8. Hervey claims that she was afraid to be alone in a room with Mastin because he was so aggressive and forceful. Hervey Dep. 211-12. Hervey alleges that the heated conversations and tension in the office created a hostile work environment.

Hervey also alleges that Nelson and Mastin contributed to this hostile work environment in other ways, such as by making requests or demands that eroded her authority as jail administrator and demeaned her as a human being. Among the requests or demands cited by Hervey are her supervisors' requests that she get their permission before purchasing phone cards, receipt books, griddles for the jail kitchen, latex gloves, shampoo, toothpaste, deodorant, shaving cream, and toilet paper. Supp. Hervey Decl. Ex. B. Hervey also complains of requests that she get her supervisors' permission before changing employee meal policies, time sheet policies, expense account policies, office key and access policies, vending machine policies, corrections officer training procedures, corrections officer scheduling, fingerprinting policies, inmate transport policies, and jail inspection policies. *Id.* She likewise complains of the requirement that she meet every day with Mastin, with Mastin's evaluations of her, and of many, many other indignities. *Id.*

C. Retaliation

Hervey received her first formal performance evaluation from Mastin on Friday, February 6, 2004. Culberth Decl. Exs. 64-65. That evaluation is described above. Hervey thought that the negative

comments in the evaluation were unfair, and they upset her a great deal. Hervey Dep. 108.

Hervey returned to work on Monday, February 9. She had decided that she would file a formal complaint against Nelson and Mastin, accusing them of sex discrimination. Hervey Dep. 108-09. She also decided that she would take the following day off so that she could work on her complaint. According to Hervey, she then left a voice mail message for Mastin, informing him that she would not be in the office the following day. Culberth Decl. Ex. 89 at 14-16. She gave no reason for her absence, did not personally speak with Mastin or Nelson, and did not submit a written request for a vacation day. Hervey Dep. 156. Mastin claims that he never received the voice mail message. Mastin Dep. 171-72.

Hervey stayed home on Tuesday, February 10, to put together a lengthy written complaint against Nelson and Mastin. Culberth Decl. Ex. 89 at 15. By the end of the day, she realized she would need more time to complete work on her complaint, so she called two dispatchers and asked them to inform Mastin that she would be out the next day. Hervey Dep. 157-58. It is not clear why she did not call Mastin or Nelson directly. When Hervey did not come to work on Wednesday, February 11, Mastin called her at home. He asked why she was absent and why she had not been at work on Tuesday. Mastin Dep. 171-72. Hervey told Mastin that she had warned him about the Tuesday absence in a voice mail message, and that she had asked the dispatchers to warn him about the Wednesday absence. Culberth Decl. Ex. 89 at 16. Mastin said that he did not receive the voice mail message, and he expressed disappointment that Hervey had not directly informed him of her intent to

miss work on Wednesday. Mastin asked Hervey to come to his office to "discuss the issue" when she returned on Thursday, February 12. *Id.* When Mastin hung up the phone, he had no idea that Hervey had skipped two days of work to put together a complaint against him. Indeed, Mastin had no idea that Hervey had concluded that she had been the victim of sex discrimination. Mastin Dep. 254-256.

On Thursday, Hervey reported to Mastin's office to discuss her absences of the previous two days. Mastin Dep. 155-57. Nelson and Mastin suspected that Hervey had skipped two days of work and lied about leaving a voice mail on Monday. Mastin Dep. 209. They were also miffed that Hervey had used the dispatchers to inform Mastin that she would be gone on Wednesday rather than calling Mastin directly. In Nelson's and Mastin's views, these were just the latest volleys fired by Hervey in her ongoing campaign to make their lives miserable in retaliation for her "demotion." Mastin Dep. 226-27; Culberth Decl. Ex. 72.

At this meeting — and without having any inkling that Hervey was about to accuse him of discrimination — Mastin told Hervey that he would be recommending to Nelson that he discipline Hervey for her conduct. Mastin Dep. 208-09. Hervey responded by telling Mastin that she intended to file a discrimination complaint with the Minnesota Department of Human Rights. Mastin Dep. 209. That same day, Hervey informed Koochiching County that she wished to make a "Respectful Workplace" complaint, Hervey Dep. 115, and the following day Hervey retained an attorney to represent her, Culberth Decl. Ex. 67.

At this point, the feud that was sparked when

Hervey was asked to report to Mastin was almost a year old. The tension in the office remained high. On February 18, Mastin decided to take action against Hervey because of what he viewed as her unauthorized absences, her dishonest explanation, and her unapologetic behavior in their meeting. Mastin took away Hervey's master key and distributed a memorandum informing the employees of the Sheriff's Department that Hervey would no longer be the final authority on jail issues. Culberth Decl. Ex. 68; Mastin Dep. 257-58. After several cancelled meetings, Nelson met with Mastin and Hervey on March 2 to discuss Hervey's unauthorized absences and her belief that she has been discriminated against. Culberth Decl. Ex. 72. Nelson decided to give Hervey a written reprimand and warning for her absences. *Id.*

Koochiching County hired an attorney to investigate the Respectful Workplace complaint filed by Hervey. The attorney determined that the allegations were unsubstantiated. Culberth Decl. Ex. 47 (Memo dated May 21, 2004). The County Board, in a closed-door session, came to the same conclusion. Culberth Decl. Ex. 5 at 185-88. On May 27, 2004, Hervey filed a claim with the Equal Employment Opportunity Commission. She received a right to sue letter on August 2, 2004, and filed this lawsuit on October 19. 2004. Culberth Decl. Exs. 8, 43, 45.

The commencement of this lawsuit did nothing to ease the tension in the Sheriff's Department. Nelson, Mastin, and Hervey continued to work side-by-side; Hervey continued to say and do things that Nelson and Mastin regarded as insubordinate; and Nelson and Mastin continued to take actions that Hervey regarded as discriminatory or as retaliation

for her pursuit of legal remedies. For example, Hervey was suspended for five days in March 2005 for refusing to meet with Mastin on a daily basis. In July 2005, Hervey was suspended again — this time for 15 days — for continuing to refuse to meet with Mastin and for failing to comply with a number of other directives. Quiring Aff. Ex. H at 36-38.

II. ANALYSIS

A. Standard of Review

Defendants have moved for summary judgment. They make several arguments in support of their motion, but the crux of their position is that, whatever the actions that have been taken against Hervey, those actions were not motivated by the fact that she is a woman or by a desire to retaliate against her for complaining of discrimination.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute over a fact is "material" only if its resolution might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a fact is "genuine" only if "the evidence is such that a reasonable jury could . . . return a verdict for [the non-movant]." *Baucom v. Holiday Cos.*, 428 F.3d 764, 766 (8th Cir. 2005).

Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing

that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Where the nonmovant provides evidence of such "specific facts," any dispute between that evidence and the evidence provided by the movant must be resolved in the nonmovant's favor. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.,* 824 F.2d 582, 585 (8th Cir. 1987). But *facts* are required to defeat a motion for summary judgment — not "mere conjecture," *ACT, Inc. v. Sylvan Learning Sys. Inc.,* 296 F.3d 657, 666 (8th Cir. 2002), not "unreasonable inferences or sheer speculation," *Howard v. Columbia Pub. Sch. Dist.,* 363 F.3d 797, 800 (8th Cir. 2004), and not "conclusory statements in [an] affidavit," *Jeseritz v. Potter,* 282 F.3d 542, 545 (8th Cir. 2002).

To defeat a motion for summary judgment, the nonmovant must present enough facts "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. Evidence is not "sufficient" unless a reasonable jury could return a verdict for the nonmovant. When a defendant has moved for summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could

reasonably find for the plaintiff.

Anderson, 477 U.S. at 252. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and summary judgment must be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

B. Title VII Claims

Hervey has sued Nelson, Mastin, and Koochiching County under Title VII for sex discrimination, hostile work environment, and retaliation. These claims are distinct. To prove sex discrimination, a female plaintiff must introduce evidence that her employer treated her differently — usually worse — than similarly situated male employees. *See LaCroix v. Sears, Roebuck, and Co.*, 240 F.3d 688, 693 (8th Cir. 2001). To recover for a hostile work environment, a female plaintiff must introduce evidence that she suffered severe and pervasive harassment that she would not have experienced if she had been a man. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Finally, to prove retaliation, the plaintiff must introduce evidence that, after she filed a discrimination complaint, her employer took action against her to discourage her from, or to punish her for, pursuing that claim. *See Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 632 (8th Cir. 2005).

In this case, Hervey argues in connection with her sex discrimination and hostile work environment claims that Nelson and Mastin took various actions against her because she is a woman. She argues, for example, that, had she been a man, she would not

have been required to report to Mastin, she would not have been asked to look for cuts in her budget, she would not have been asked to work two hours each day as a corrections officer, she would not have been asked to get Mastin's approval for expenditures over $100, and so on. With respect to the retaliation claim, Hervey argues that various other actions were taken against her to punish her for pursuing her claims of sex discrimination and hostile work environment.

There is no direct evidence that any of the dozens of actions cited by Hervey were motivated by the fact that Hervey is a woman or by the fact that Hervey was pursuing legal remedies. Of course, it is often true in employment discrimination cases that there is no direct evidence that the employer acted on a prohibited basis. But it nevertheless bears emphasizing in this case. Hervey has spent 30 years as one of a small number of females working among male law enforcement officers in a small-town jail located in a remote county. One would not be surprised to find in such a setting at least a little direct evidence of sex discrimination — a sexist remark, an off-color joke, a lewd e-mail message. And yet the record in this case contains nothing of the sort, despite the fact that Hervey has spent much of the past three years recording everything that gave her offense.

Where, as here, the record is devoid of any direct evidence that the employer acted on a forbidden basis, the plaintiff's claims are analyzed under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The plaintiff must first make a prima facie case of discriminatory conduct by the employer. Then, to dispel the inference of discrimination created by plaintiff's prima facie case, the employer must

articulate a legitimate, non-discriminatory reason for its conduct. *McDonnell Douglas,* 411 U.S. at 803; *Griffith v. City of Des Moines,* 387 F.3d 733, 735-36 (8th Cir. 2004). Once the employer provides a legitimate reason for the allegedly discriminatory conduct, the plaintiff must show that "defendant's articulated reason was in fact 'not the true reason for the employment decision' and a 'pretext for discrimination.'" *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1056 (8th Cir. 1997) (quoting *Texas Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 256 (1981)). "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 519 (1993). With this in mind, the Court now turns to each of Hervey's claims.

1. Sex Discrimination

Hervey first claims that she was discriminated against on account of her sex in violation of Title VII. To make out a prima facie case of sex discrimination, Hervey "must . . . demonstrate that she (1) is a member of a protected class; (2) was qualified to perform her job; (3) suffered an adverse employment action; and (4) was treated differently from similarly situated males." *Hesse,* 394 F.3d at 631. Hervey has clearly established the first two elements: She is a woman and thus is a member of a protected class, and there is no doubt that she is qualified to perform her job.

The defendants argue that the third element is missing because, they say, Hervey has not suffered an adverse employment action. They point out that Hervey continues to be employed as jail administrator with essentially the same salary and

benefits. Hervey, in response, cites dozens of alleged adverse actions, beginning with the "demotion" that she experienced in April 2003 when she was asked to report to Mastin rather than directly to Nelson.

Not everything that makes an employee unhappy is an "adverse employment action" for purposes of Title VII. Every employee has an occasional bad day. Every employee is given an unwelcome assignment or gets criticized by a boss or experiences rude behavior from a coworker. To be actionable under the anti-discrimination provisions of Title VII, an "adverse employment action" must materially alter or impact the terms of the plaintiff's employment. *See Enowmbitang v. Seagate Tech., Inc.*, 148 F.3d 970, 973 (8th Cir. 1998). Put differently, the action must be "'significant,'" it must have more than a "tangential effect on . . . employment," and it must be "'more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (citations omitted). The Eighth Circuit has issued a number of opinions holding that an employee does not experience an "adverse employment action" when, for example, she receives a negative performance review or has some of her duties taken away. *See, e.g., Zhuang v. Datacard Corp.*, 414 F.3d 849, 854 (8th Cir. 2005) (reassignment of duties); *Cossette v. Minn. Power & Light*, 188 F.3d 964, 972 (8th Cir. 1999) (negative performance reviews); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more stressful position with more onerous duties).

The Court agrees with the defendants that almost all of the actions cited by Hervey do not rise to the level of an "adverse employment action" for

purposes of the anti-discrimination provisions of Title VII — including some of the actions about which she complains most vehemently, such as being asked to report to Mastin or being asked to meet daily with Mastin. But there are exceptions. Hervey has not merely had a duty or two reassigned; she has been stripped of most of her major responsibilities. Moreover, Hervey has been suspended twice without pay. There is no question that a suspension without pay is an "adverse employment action" for purposes of Title VII. *See McClure v. Career Sys. Dev. Corp.*, 447 F.3d 1133, 1137 (8th Cir. 2006); *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 802 (6th Cir. 2004) (the act of suspending an employee for 37 days without pay is "not the type of employment action the court developed the adverse-employment-action element to filter"), *aff'd*, 126 S. Ct. 2405 (2006).

The weakness in Hervey's prima facie case is instead with the fourth and final element: Hervey has no evidence that she "was treated differently from similarly situated males." *Hesse*, 394 F.3d at 631. This is obviously true with respect to many of the actions of which Hervey complains — actions that likely do not rise to the level of an "adverse employment action" anyway. For example, the record is clear that Mastin wanted everyone (male and female) to report to him, Culberth Decl. Ex. 57 at 4; that everyone in Koochiching County (male and female) was asked to help find budget cuts, Mastin Dep. 293; that everyone in Koochiching County (male and female) was asked to take on additional duties or otherwise do more with less, Jaksa 172-73; and that Koochiching County imposed new budgetary procedures on everyone (male and female), *id.* Hervey's argument that, for example, she was asked

to find savings in her budget only because she is a woman is simply not credible.

As noted, though, Hervey did suffer adverse employment actions that were not widely inflicted on other employees — in particular, the loss of most of her major responsibilities and two suspensions without pay. In order to show that she suffered these adverse actions because she is a woman — and not, for example, because of a personality conflict or because of her own behavior — Hervey must offer evidence of (1) a similarly situated male (2) who was involved in behavior that was of "comparable seriousness" and (3) who was given more lenient treatment. *Russell v. TG Mo. Corp.*, 340 F.3d 735, 745 (8th Cir. 2003). The "individual[] used for comparison must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances." *Clark v. Runyon,* 218 F.3d 915, 918 (8th Cir. 2000).

Hervey cites two such "similarly situated males": Mastin and Mastin's son, Rich. Rich works as a police officer for the City of International Falls, but he sometimes fills in for the Koochiching County Sheriff's Department as a backup deputy. As to Mastin, Hervey complains that he has never had his duties reassigned or been suspended without pay, even though he has engaged in various misbehavior over the past 30 years, including serving time for robbery, serving time for assaulting a police officer, lying on his application to the P.O.S.T. board, falsely arresting a citizen, and twice being involved in serious domestic disputes with his wife. Pl.'s Resp. Mem. 46. As to Rich, Hervey complains that the Sheriff's Department failed to act against him even

though he "violated the code of conduct by driving intoxicated over the legal limit." *Id.* at 47.

There are two problems with the comparison that Hervey is trying to make. First, Mastin and Rich are not "similarly situated" to Hervey. Mastin is Hervey's boss. He is the undersheriff of Koochiching County, second in line to the sheriff, with responsibilities that differ markedly from Hervey's. Rich is not even a full-time employee of the Sheriff's Department. He is instead employed full-time by the City of International Falls and fills in only occasionally as a deputy sheriff for Koochiching County. His responsibilities are also very different from Hervey's.

Second, the conduct of Mastin and Rich is not "similar" to Hervey's. Hervey's reduction in duties and suspensions came in response to persistent — even daily — conduct that her supervisors viewed as insubordinate and disruptive, such as refusing to accept Nelson's decision about reporting lines, refusing to help find savings in her budget, going over her superiors' heads to the County Board to ask for more money, complaining about being asked to assume additional duties, complaining about having to follow new budget procedures, taking unauthorized absences, and going over her superiors' heads to the County Attorney. Typical of Hervey's behavior has been her stubborn refusal to simply stick her head in Mastin's office each day and check in with him. She has persistently dragged her feet about meeting with him — and, even when she has met with him, she has insisted on recapping the meetings in sometimes obsessively detailed e-mail messages. *See, e.g.*, Supp. Hervey Decl. Ex. B. In suspending Hervey, the Sheriff's Department cited this persistent

insubordinate behavior, as well as other grounds such as failing to conduct fire drills, return time cards, fulfill canteen duties, and keep the jail stocked. Quiring Aff. Ex. H at 36-38.

Hervey has not pointed to one male employee who has engaged in anything remotely like this type of behavior. Mastin's conduct involved a few unrelated, isolated incidents, almost all of which occurred years or even decades before he was appointed undersheriff. Rich's conduct involved a single incident that was unconnected to his fill-in work for Koochiching County. It is impossible to compare, say, Hervey's refusal to meet with her supervisor on a daily basis with, say, Mastin's lying on an application over two decades ago.

Hervey has failed to submit any other evidence that Nelson or Mastin acted against her because of her sex. Instead, she time and again substitutes speculation for evidence. She is particularly fond of the following form of argument: Sexist people believe that women should be compliant, defendants wanted Hervey to comply with their directives, and therefore defendants are sexist. Or sexist people believe that women are incompetent, defendants accused Hervey of making mistakes, and therefore defendants are sexist. The fallacies in Hervey's logic are obvious, and accepting such "logic" in place of evidence would mean that no employer could ever be granted summary judgment in a Title VII case.

Hervey has the burden of proof. She must provide evidence (not speculation) that Nelson and Mastin acted against her because she is a woman (not because of her behavior, or because of a personality conflict, or because of any other reason). Hervey has provided no such evidence. For that reason, Hervey

has failed to establish a prima facie case of discrimination under *McDonnell Douglas,* and defendants are entitled to summary judgment on Hervey's discrimination claim.

2. Sexual Harassment

Hervey also claims that Mastin and Nelson subjected her to a hostile work environment in violation of Title VII. To support her claim, Hervey must make a prima facie showing that: "(1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected group status; and (4) the harassment affected a term, condition, or privilege of employment." *Hesse,* 394 F.3d at 629. The harassment must be objectively severe and pervasive, and "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview." *Harris,* 510 U. S. at 21.

Hervey alleges that, immediately after she objected to having to report to Mastin, "Sheriff [Nelson] and UnderSheriff Mastin began a concerted campaign to create an intolerably hostile environment." Pl.'s Resp. Mem. 16. Hervey focuses her hostile work environment claim largely — although not exclusively — on the fact that Nelson and Mastin often became angry with her and shouted at her.

Even assuming that Hervey has met the other elements of a prima facie case, Hervey has failed to point to any evidence that this harassment was based on sex. In other words, Hervey has failed to present

evidence that Nelson and Mastin would not have lost their tempers with a male employee who, for example, challenged Nelson's authority to reorganize his staff or refused to help reduce the budget or went over Mastin's head to the County Board or persistently resisted a directive to meet with Mastin. To the contrary, Hervey has supplied evidence that Mastin's management style caused as much conflict with male employees as with female employees. Raboin Aff. 33. Gary Loop, one of the E/911 corrections officers, spoke to the County Coordinator about the dynamics in the Sheriff's Department, as "the low morale and lack of teamwork that John Mastin and Nelson [] fostered had become nearly intolerable." Loop Decl. ¶ 12. Another corrections officer, Joe Fults, felt forced to resign because he "finally had enough of John Mastin." Fults Decl. ¶ 5. In Fults's view, Mastin "created an atmosphere of discontent amongst employees." Fults Decl. ¶ 6.

Title VII is not a "general civility code," *Oncale v. Dundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1980), and "generalized harassment in the workplace is not illegal under Title VII," *Hesse*, 394 F.3d at 630. Nelson and Mastin might have been the world's worst supervisors, and they might have run the world's most hostile workplace, but, as long as they did not act against Hervey because she is a woman, they cannot be held liable under Title VII. *See id.*

Joens v. John Morrell & Co., 354 F.3d 938 (8th Cir. 2004), is instructive. In *Joens*, the plaintiff, LaDonna Joens, alleged that her shift supervisor, Herman Johnson, "constantly swore, yelled at her, and accused her of not doing anything," and singled her out for criticism. *Id.* at 939. The Eighth Circuit, however, affirmed summary judgment in favor of the

employer, finding, first, that Joens did not prove that the conduct was sufficiently severe or pervasive, and second, that the claim lacked any causal link to sex-based animus:

> Johnson never physically threatened Jones. He made no sexual advances or comments to Joens, and they had no contact other than Johnson's allegedly abusive complaints that Joens was not making enough boxes for the cut floor. . . . Particularly given the gender-neutral nature of Johnson's complaints, this constitutes nothing more than unsubstantiated suspicion that Johnson's allegedly abusive treatment was based on sex.

Id. at 941-42.

Like the plaintiff in *Joens,* Hervey claims that she was not "allowed to do the job she was hired to do because of her gender." Pl.'s Resp. Mem. 25. But, like the plaintiff in *Joens,* Hervey has provided nothing more than "unsubstantiated suspicion" that Nelson and Mastin acted against her because of her sex. That speculation is not merely "unsubstantiated"; it conflicts with evidence in the record, such as the fact that Nelson appointed Hervey to her position, gave Hervey almost complete autonomy for two years, and fought to save Hervey's job even while Hervey was criticizing him for making her report to Mastin.

Because Hervey has no evidence of a connection between whatever harassment she suffered and the fact that she is a woman, she has failed to make out a prima facie case of a hostile work

environment, and defendants are entitled to summary judgment.

3. Retaliation

Even if Hervey has not been the victim of sex discrimination or of a hostile work environment, Hervey is nevertheless entitled to recover against defendants if they retaliated against her for pursuing her rights under Title VII. To establish a prima facie case of retaliation, Hervey must show "(1) that she engaged in activity protected under Title VII; (2) that an adverse employment action was taken against her; and (3) that there was a causal connection between the two." *Hesse,* 394 F.3d at 632. The first two elements are clearly present: Hervey has engaged in activity protected by Title VII, and, as this Court has already held, Hervey suffered adverse employment action when she was stripped of most of her responsibilities and suspended twice without pay.[6] The question is whether Hervey has presented evidence of a "causal connection" between her

---

[6] In *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S. Ct. 2405 (2006), the Supreme Court held that an action may be an "adverse employment action" for purposes of a retaliation claim, even if the same action is not an "adverse employment action" for purposes of a discrimination claim, *id.* at 2415. An employment action can be "adverse" for purposes of a discrimination claim only if it has a material impact on employment. But an action can be "adverse" for purposes of a retaliation claim even if it does not have a material impact on employment, as long as it might discourage unfettered access to the statutory protections of Title VII. *See id.* at 2412. Given that Hervey's loss of major responsibilities and suspensions without pay have already been held to be "adverse" for purposes of her discrimination claim, those actions are obviously "adverse" for purposes of her retaliation claim.

protected activity and the adverse actions.

Hervey's feud with Nelson and Mastin began in April 2003. Hervey makes this point clearly in her brief. For example, Hervey writes at one point:

> When [Hervey] objected to being "put in her place," with objective evidence that her job description and County organizational charts showed she was a peer to the Undersheriff and reported directly to the Sheriff, Mastin and Nelson erupted with anger and *started on a course of discrimination and retaliation that continues to this day.*

Pl.'s Resp. Mem. 2-3 (emphasis added). Later in her brief, Hervey similarly asserts that

> *[b]eginning immediately following this meeting,* the Sheriff and UnderSheriff Mastin began a concerted campaign to create an intolerably hostile environment for . . . Hervey.

Id. at 16 (emphasis added). In other words, Hervey clearly alleges that defendants began to discriminate against her, create a hostile work environment, and retaliate against her in *April 2003.* And, in support of her allegations, Hervey has cited many of the adverse actions recounted above, such as being required to report to Mastin, being asked to cut her budget, being assigned additional duties, and being yelled at. All of this happened before February 2004.

The problem is that Hervey gave defendants no reason to believe that she regarded herself as a victim of sex discrimination — and thus gave

defendants no reason to believe that she had engaged in activity protected by Title VII — until *February 12, 2004*. This was almost a year *after* she started feuding with Nelson and Mastin. Bad things happened to Hervey before February 12, 2004, and bad things happened to Hervey after February 12, 2004. The former obviously could not have been in retaliation for Hervey's pursuit of her legal rights. The latter could have been — but they could just as easily have been a continuation of the feud. What Hervey must provide is evidence that, when something bad happened to her after February 12, 2004, it happened because she was exercising her rights under Title VII, and not for some other reason (such as insubordinate conduct on her part).

Hervey relies almost entirely on the temporal proximity between her engaging in protected activity and the defendants taking adverse action. For example, Hervey points out that within a week after she informed Mastin that she would be pursuing legal remedies, Mastin took away her master key and posted a memo informing employees that she was no longer the final authority on issues related to the jail. Hervey Decl. Ex. 1 at 40-41. This was an important step in eliminating most of Hervey's authority, and its close proximity to the February 12, 2004 meeting between Mastin and Hervey gives rise to an inference that it was retaliatory.

Similarly, Hervey points out that her second suspension — in July 2005 — occurred about two weeks after she asked to take vacation time to attend depositions that her attorney had recently scheduled in this action. Again, Hervey argues that the close proximity of her request and the suspension gives rise to an inference that defendants were retaliating

against her.

Although the question is close, the evidence cited by Hervey is not sufficient to make a prima facie case of a connection between protected activities and adverse actions. The Eighth Circuit has held that "more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). This case illustrates the wisdom of that holding. Beginning in February 2004 and continuing to this day, Hervey has been engaged in pursuing her legal rights while she has simultaneously been engaged in a feud with her supervisors. Because of the former, she has often engaged in protected activity. Because of the latter, her supervisors have often taken action against her. Every one of those actions was necessarily in at least somewhat close proximity to a protected activity, because both the actions and the protected activity have been ongoing.

Thus, as the Eighth Circuit has held, Hervey cannot rely solely on the "temporal connection" between her informing Mastin of her complaint on February 12, 2004 and Mastin disciplining her a few days later — especially when Mastin informed Hervey of his intention to discipline her *before* Hervey informed Mastin of her intention to file a complaint. Culberth Decl. Ex. 89 at 16. Likewise, Hervey cannot rely solely on the temporal connection between her asking for time off from work to attend depositions in early July 2005 and her suspension in late July 2005 — especially since the suspension was Hervey's second and it was for a long list of problems that arose before the depositions were even noticed.

Quiring Aff. Ex. H at 36. Hervey needs at least some evidence — in addition to temporal proximity — that an adverse action was retaliatory, and she appears to have no such evidence. (Hervey has not been able to cite even a temporal connection between the March 2005 suspension (her first) and a significant event in the litigation.)

Even if this Court were to find that Hervey had made out of prima facie case of retaliation, Hervey's retaliation claim would be dismissed. The defendants have provided legitimate, non-discriminatory reasons for the suspensions and other actions taken against Hervey. Specifically, they have cited a continuing course of insubordinate conduct by Hervey — such as the daily dramas over the request that she meet with Mastin — as well as deficiencies in her performance of her remaining duties as jail administrator. Title VII's anti-retaliation provisions cannot be used to "insulate an employee from discipline for violating the employer's rules or disrupting the workplace." *Griffith*, 387 F.3d at 738 (quoting *Kiel*, 169 F.3d at 1136).

In response, Hervey disagrees with many of the reasons that defendants gave for their actions, but she has provided no evidence on which a reasonable jury could rely to find that the defendants' explanations are pretextual. Hervey has pointed to temporal connections between protected activities and adverse actions, but, as noted above, that evidence is insufficient even to make out a prima facie case of retaliation. Hervey also offers the affidavit of a female corrections officer, Jan McClanahan, who states that she is afraid that she might suffer retaliation for assisting Hervey in this lawsuit. McClanahan Decl. ¶ 2. McClanahan cites no

evidence that her fear is well-grounded; in fact, McClanahan admits that she is "on very good terms with John Mastin . . . [and has] not received criticisms of [her] job performance from him or anyone else." McClanahan Decl. ¶ 7.

For the reasons described, Hervey has not made a prima facie claim of retaliation, and defendants are entitled to summary judgment.

C. MGDPA Claim

Hervey's final claim is asserted against Koochiching County under the MGDPA. Here are the relevant facts:

On July 1, 2004, Mastin tape recorded a meeting with Hervey and had a transcript of the meeting prepared. Mastin Dep. 291-92. Mastin brought the transcript home and left it on his kitchen table. R. Mastin Dep. 10. Later, Mastin and his son Rich discussed Mastin's conflict with Hervey, and Mastin gave Rich a copy of the transcript. R. Mastin Dep. 10. Rich took the transcript from his father, put it above the visor in his truck, and did nothing more with it. R. Mastin Dep. 10.

A few weeks later, Rich got into an accident while driving drunk, and the transcript ended up in a ditch, where it was found by investigating officers. R. Mastin Dep. 9-10. The local newspaper reported that a transcript of a meeting between Mastin and Hervey was found at the scene of Rich's accident. The newspaper did not reveal the contents of the transcript. Hervey Dep. 215. Hervey nevertheless felt "humiliated" by the newspaper account. Hervey Dep. 215.

Under the MGDPA, "[p]rivate or confidential data on an individual shall not be . . . disseminated

by government entities for any purposes other than those stated to the individual at the time of collection." Minn. Stat. § 13.05 subd. 4 (2001). Only a government entity — and not an individual public employee — can be held liable for disseminating private or confidential data in violation of MGDPA. Minn. Stat. § 13.08 subd. 1. Moreover, a government entity cannot be held liable for the unlawful dissemination of private or confidential data by an individual employee unless that employee was acting within the scope of his employment. *Walker v. Scott County*, 518 N.W.2d 76, 78 (Minn. Ct. App. 1994).

Even assuming that all other requirements of the statute are met, Hervey cannot recover against Koochiching County because she has no evidence that Mastin was acting within the scope of his employment when he gave the transcript to Rich. *Walker v. Scott County* presented similar facts. In *Walker*, a deputy sheriff obtained Bernard Walker's criminal record from a county computer in his office and gave the information to his father. *Id.* The Minnesota Court of Appeals held that Scott County could not be liable for the deputy sheriff's actions because (1) his conduct did not benefit the County and (2) his purpose in obtaining the information was entirely personal and therefore not within the scope of his employment. *Id.* at 78-79.

Similarly, Mastin obtained a transcript of a meeting with Hervey and gave a copy of the transcript to Rich. Mastin and Rich are father and son. Mastin gave Rich the transcript in the family kitchen. Neither Mastin nor Rich was "on duty" while talking in the kitchen. There is no evidence that Mastin's giving the transcript to Rich benefitted Koochiching County. And there is no evidence that, in

giving the transcript to Rich, Mastin was performing or intending to perform any professional duty. Mastin acted wrongly, and Koochiching County had ample justification to discipline him. But Koochiching County is not liable for Mastin's action under the MGDPA.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Defendants' Motion for Summary Judgment [Docket No. 108] is GRANTED, and
2. Plaintiff's claims are DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 20, 2006

s/ Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-3891

Florence Hervey,
Appellant

v.

County of Koochiching, et al.,
Appellees

Appeal from U. S. District Court for the District of Minnesota - Minneapolis
(0:04-cv-04537-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy, Judge Bye, Judge Melloy and Judge Smith would grant the petition for rehearing en banc.

August 05, 2008

Order Entered at the Direction of the Court:
Clerk, U. S. Court of Appeals, Eighth Circuit.

/s/
Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FLORENCE HERVEY, Plaintiff,	Case No. 04-CV-4537 (PJS/RLE)
v.	
DUANE NELSON, et al., Defendants.	**ORDER AMENDING JUDGMENT**

On June 9, 2008, the United States Court of Appeals for the Eighth Circuit affirmed this Court's judgment in part and remanded the case for the purpose of modifying the judgment so as to dismiss without prejudice plaintiff's claim under the Minnesota Government Data Practices Act. The formal mandate issued on August 12, 2008.

Based on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT the October 23, 2006 judgment [Docket No. 181] is AMENDED to read as follows:

1. Plaintiff's claim under the Minnesota Government Data Practices Act is DISMISSED WITHOUT PREJUDICE.
2. The remainder of plaintiff's claims are DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 26, 2008

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

114 (2)

No. 08-606

Supreme Court, U.S.
FILED
DEC 8 - 2008
OFFICE OF THE CLERK

In the Supreme Court of the United States

Florence Hervey,

Petitioner,

v.

County of Koochiching; Sheriff Duane Nelson, individually and in his official capacity; and Undersheriff John Mastin, individually and in his official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

RATWIK, ROSZAK & MALONEY, P.A.
Ann R. Goering
Counsel of Record
Eric J. Quiring
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondents

2008 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioner's retaliation claim where Respondents had no actual or constructive knowledge of Petitioner's protected conduct until after she engaged in misconduct that was the basis for discipline?

2. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioner's retaliation claim that was based solely on temporal proximity?

3. Whether the Eighth Circuit correctly affirmed summary judgment on Petitioner's gender discrimination claim due to Petitioner's failure to establish that she was treated differently than a similarly situated male employee?

TABLE OF CONTENTS

Questions Presented..... i

Table of Contents..... ii

Table of Authorities..... iv

Statutory Provisions Involved..... 1

Statement of the Case..... 1

Reasons for Denying the Petition..... 10

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT HERVEY'S REFERENCE TO THE RESPECTFUL WORKPLACE POLICY WAS NOT PROTECTED CONDUCT UNDER TITLE VII. 10

A. The Eighth Circuit's Decision does not Leave Employees who Resort to Internal Anti-Discrimination and Anti-Harassment Policies Unprotected. 11

B. Hervey did not Oppose a Practice by Resort to the County's Internal Policy... 15

II. THE EIGHTH CIRCUIT'S DECISION CORRECTLY DETERMINED THAT HERVEY COULD NOT ESTABLISH CAUSATION BY TEMPORAL PROXIMITY ALONE. 16

A. Respondents have Produced Evidence of Their Legitimate Non-Retaliatory Reasons for Their Actions. 19

III. THE EIGHTH CIRUIT CORRECTLY AFFIRMED SUMMARY JUDGMENT ON HERVEY'S GENDER DISCRIMINATION CLAIM BECAUSE SHE FAILED TO SHOW THAT SHE WAS TREATED DIFFERENTLY THAN A SIMILARLY SITUATED MALE EMPLOYEE. 22

A. Hervey Failed to Identify any Similarly Situated Male Employees Who were Treated Differently. 23

B. Hervey Failed to Establish that she was Treated Differently than Similarly Situated Employees under any Comparable Conduct Analysis..... 30

Conclusion..... 33

TABLE OF AUTHORITIES

CASES

Aramburu v. The Boeing Company,
112 F.3d 1398 (10th Cir. 1997)..... 28
Bryant v. Aiken Regional Medical Centers Inc.,
333 F.3d 536 (4th Cir. 2003)..... 26
Burke-Fowler v. Orange County, Florida,
447 F.3d 1319 (11th Cir. 2006)..... 28
Burks v Wisconsin Dept. of Transportation,
464 F.3d 744 (7th Cir. 2006)..... 27, 29
Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998)..... 11, 16
Clark v. Runyon,
218 F.3d 915 (8th Cir. 2000)..... 24
Cook v. CSX Transportation Corp.,
988 F.2d 507 (4th Cir. 1993)..... 25
Crawford v. Metropolitan Government of
Nashville and Davidson County, Tenn.,
211 Fed. Appx. 373 (6th Cir. 2006)..... 13
Davis v. City of Philadelphia Water Dept.,
57 Fed. Appx. 90 (3rd Cir. 2003)..... 25
Davis v. Team Electric Co.,
520 F.3d 1080 (9th Cir. 2008)..... 21
E.E.O.C. v. Brown & Root, Inc.,
688 F.2d 338 (5th Cir. 1982)..... 26
E.E.O.C. v. Total Systems Services, Inc.,
221 F.3d 1171 (11th Cir. 2000)..... 13
Evans v. City of Houston,
246 F.3d 344 (5th Cir. 2001) 13, 14
Ezell v. Potter,
400 F.3d 1041 (7th Cir. 2005) 27
Faragher v. Boca Raton,
524 U.S. 775 (1998) 11, 16

Garcia v. Bristol-Myers Squibb Co.,
535 F.3d 23 (1st Cir. 2008) 24
Garrity v. New Jersey,
385 U.S. 493 (1967) 9
Gragg v. Somerset Technical College,
373 F.3d 763 (6th Cir. 2004)..... 27
Graham v. Long Island RR,
230 F.3d 34 (2nd Cir. 2000). 25
Hannoon v. Fawn Eng'g Corp.,
324 F.3d 1041 (8th Cir. 2003)..... 19
Hill v. St. Louis University,
123 F.3d 1114 (8th Cir. 1997)..... 20
Hitt v. Harsco Corp.,
356 F.3d 920 (8th Cir. 2004)..... 19
Hutson v. McDonnel Douglas Corp.,
63 F.3d 771 (8th Cir. 1995)..... 20
Kotcher v. Rosa and Sullivan Appliance
Center, Inc.,
957 F.2d 59 (2nd Cir. 1992)..... 13
Lynn v. Deaconess Med. Ctr.-W. Campus,
160 F.3d 484 (8th Cir. 1998)..... 24
Mickey v. Zeidler Tool and Die, Co.,
516 F.3d 516 (6th Cir. 2008)..... 21
Nix v. WLCY Radio/Rahall Communications,
738 F.2d 1181 (11th Cir. 1984) 28
Perry v. McGinnis,
209 F.3d 597 (6th Cir. 2000). 26
Strong v. University Healthcare System, L.L.C.,
482 F.3d 802 (5th Cir. 2007) 26
Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) 23
Tolen v. Ashcroft,
377 F.3d 879 (8th Cir. 2004) 23

Vasquez v. County of Los Angeles,
349 F.3d 634 (9th Cir. 2004) 27, 28
White v. Burlington No. and S.F.R. Co.,
548 U.S. 53 (2006) 15

STATUTES AND RULES

42 U.S.C. § 2000e, *et seq*..... 1
Minn. Stat. § 13.01, *et seq*..... 1
Minn. Stat. § 363.01, *et seq*..... 1
Minn. Stat. § 375.08..... 29
Sup. Ct. R. 10..... 10

STATUTORY PROVISIONS INVOLVED

United States Code Title 42, Section 2000e-3(a). See Pet. at 1.[1]

STATEMENT OF THE CASE AND THE FACTS

Petitioner Florence Hervey ("Hervey") initiated this action against her employer, Koochiching County, former Sheriff Duane Nelson and former Undersheriff John Mastin (collectively "Respondents") alleging employment discrimination based on disparate treatment because of her gender, hostile work environment based on gender, and retaliation under Title VII, 42 U.S.C. § 2000e, *et seq.* and the Minnesota Human Rights Act, Minn. Stat. § 363A.01, *et seq.* Hervey also asserted a claim against Koochiching County for a violation of the Minnesota Government Data Practices, Minn. Stat. § 13.01, *et seq.* On June 9, 2008, the Eighth Circuit Court of Appeals affirmed summary judgment for Respondents, which was granted by the United States District Court for the District of Minnesota on October 20, 2006. The Eighth Circuit also denied Hervey's Petition for Rehearing En Banc on August 5, 2008. The District Court subsequently entered judgment consistent with the Eighth Circuit's decision on September 26, 2008.

Hervey was employed by Koochiching County beginning in 1976 as a jailer dispatcher. She remained in that position until she was promoted to

---

[1] Citations in the form "Pet." are to Petitioner's Petition. Citations in the form "Pet.'s App." are to the Appendix to the Petition.

the position of Jail Administrator effective February 12, 2001. At the time of her promotion, the Undersheriff was Robert Byman, who retired April 30, 2003. Nelson appointed John Mastin as Byman's replacement.[2]

Hervey alleges in her Petition that she had not received any significant job criticisms during her employment with the County. This is incorrect. Byman testified in his deposition to disputes and criticisms of Hervey.[3] No performance evaluations were conducted of Hervey during her employment until 2004, when the evaluation of all staff was commenced.

The Sheriff, consistent with his authority as an elected official, developed a chain of command for the Sheriff's Office which required Hervey to report to Mastin. A memo outlining the chain of command was issued in April 2003.[4]

At an April 2003 meeting between Byman, Nelson, Mastin and Hervey, Hervey objected to the chain of command, arguing without reference to any legal authority that only the County Board could make such a change.[5] Both Hervey and Nelson raised their voices, with Hervey stating that she would not report to Mastin and that the duly elected Sheriff did not have the authority to change the reporting structure in his own office.[6] Nelson told

---

[2] Pet.s' App., A-2.
[3] Respondents' Appellate Brief, p. 11, 54, Appendix 204-207.
[4] Pet.'s App., A-41.
[5] Id.
[6] Id., A-42.

Hervey that she was "disrespectful."[7] Hervey stated that Nelson had "respectful workplace issues."[8] She did not allege any form of harassment or discrimination based on gender or any other protected class, nor did she file a complaint under the County's Respectful Workplace Policy.

The County's Respectful Workplace Policy prohibits discrimination as well as "rudeness," "angry outbursts" and "disrespectful language," whether or not such conduct is related to protected class status.[9]

Throughout the summer and fall of 2003, Hervey repeatedly failed or refused to follow directives issued to her by Mastin and Nelson and engaged in acts of insubordination, including the requirement to review her budget to determine ways to save money in the midst of a budget crisis and instead issuing a memo saying not a dime could be reduced and recommending a significant *increase* in her staff.[10] Hervey repeatedly violated a departmental directive and directly contacted both the County Attorney and County Board regarding internal department matters without prior approval of the Sheriff.[11] At no time during any discussions with Nelson and Mastin, when confronted regarding her misconduct did Hervey ever allege gender based harassment or discrimination, nor did she file a complaint alleging such pursuant to the County's internal policy.

---

[7] Id., A-17.
[8] Id., A-3.
[9] Pet.'s App., A-17.
[10] Id., A-42.
[11] Id., A-3.

Due to the budget crisis, both Nelson and Mastin took on additional duties.[12] After Hervey refused to examine ways to find cost savings in the jail, the County Board looked at eliminating her position. Nelson fought to save the position and was successful. However, in order to save money, Hervey was assigned to work two hours per day as a corrections officer.[13]

Hervey's performance evaluation was conducted on February 6, 2004. Hervey was given high ratings for her knowledge of the position and productivity, but low ratings for teamwork, judgment and dependability. She was found to be supportive of her own staff in the jail, but needed to become a team player in the overall department.[14]

Hervey took off February 10 and 11, 2004 without speaking to either Nelson or Mastin. She stayed home those days and drafted a document claiming unfair treatment in response to the evaluation.[15]

Mastin called Hervey at home on February 11 and asked why she had not been at work the prior day and told her he wanted to meet with her the next morning regarding her absences.[16] At the meeting on February 12, Mastin informed Hervey that he had not received any voicemail message from her or her

---

[12] Pet.'s App., A-44.
[13] Id., A-4.
[14] Id.
[15] Id.
[16] Id., A-5.

co-worker[17] regarding her intent to be absent and her missing two days of work without speaking to either him or Nelson directly.[18] Mastin told Hervey that he intended to recommend to Nelson that she be disciplined for her conduct.[19] Hervey then informed Mastin that she intended to file a complaint with the Minnesota Department of Human Rights.[20]

Hervey met with County Coordinator Jaksa on February 12 and informed her that Mastin was intending to recommend discipline to Sheriff Nelson.[21] Hervey told Jaksa she felt she was being treated improperly by Mastin and that he was controlling her too much for her to do her job.[22] Jaksa contacted the Sheriff and the meeting scheduled for that afternoon was postponed. Jaksa informed Hervey of her right to file a respectful workplace complaint under the County's policy, and Hervey indicated she would like to do so.[23] Jaksa further informed Hervey that it would not be appropriate for her to investigate the complaint, as she knew all of the parties and that she would be leaving on vacation the next day.[24] Jaksa informed Hervey that she would follow-up with her once Jaksa returned.[25] The

---

[17] Hervey alleges, citing only her brief as evidence, that Mastin admitted to receiving a voice mail from a co-worker, which Respondent disputes.

[18] Pet.'s App., A-52.

[19] Id.

[20] Id.

[21] App. to Resp. Appell. Brief, 139.

[22] Id., at 140.

[23] Id.

[24] Id.

[25] App. to Resp. Appell. Brief, 140.

claim in her Petition that the Jaksa refused to take her complaint is misleading at best.

Hervey hired an attorney who contacted the County Attorney on February 13, 2004 to schedule a meeting, which was then postponed until Jaksa returned from vacation.[26] When Jaksa returned from her vacation, she e-mailed Hervey asking if she wanted to file a complaint pursuant to County policy at that time.[27] Hervey responded that she would do so through her attorney.[28]

Mastin and Nelson rescheduled the meeting with Hervey for February 17, 2004. At that time, Mastin had been informed that Hervey had been in his office when he was not present going through files in his office. Hervey did not need a master key to perform her job duties and Mastin was concerned about confidential files in his office. Therefore, her master keys were removed from her and a memo issued regarding her job duties on February 18, 2004.[29]

On February 18, 2004, after the meeting with Nelson, Mastin and Hervey on February 17, Hervey's attorney sent another letter to the County making additional allegations.[30] The meeting with Hervey regarding her absence from work on February 10th and 11th was finally scheduled for March 2, 2004, primarily due to the intervention of her attorney.

---

[26] Id., at 120.
[27] Id., at 95-96.
[28] Id., at 141.
[29] Pet.'s App., A-53.
[30] App. to Resp. Appell Brief. 186-189.

On March 12, 2004, Hervey's attorney issued a Notice of Claim to the County.[31] The County began a respectful workplace investigation through an outside investigator. The investigator interviewed Hervey, Mastin and other witnesses and issued a report concluding that the allegations were unsubstantiated.[32] Hervey was notified of this on May 21, 2004.[33] Six days later, Hervey, through her attorney, sent a letter to the EEOC alleging discrimination, followed by a charge of discrimination dated June 14, 2004.[34]

Hervey falsely alleges that Mastin, along with other armed officers, forced his way into her attorney's office. This claim is spurious. The undisputed facts establish that the visit to Biggins' office on May 28, 2004, was instigated and controlled by the International Falls Police Department.[35] Mastin was merely called by that Department as backup. There is absolutely no evidence of forcible entry in the record.

Both Hervey and a male employee were warned in June 2004 about using a County credit card for the purchase of alcohol, which is a clear violation of County policy. There is no evidence of any other employees using County credit cards for such purposes that were treated differently.

---

[31] Id., at 195-202.
[32] Id.
[33] Id.
[34] Id.
[35] Resp. Appell. Brief, App. 216-222.

Moreover, Hervey was the male employee's direct supervisor.[36]

Hervey persisted in violating directives throughout 2004 and 2005, including her ongoing insubordination in refusing to meet with Mastin on a daily basis to update him regarding the jail, even though their offices were only ten feet apart, as well as other numerous documented issues.[37] Due to her ongoing misconduct, Hervey was suspended for five days in March 2005 and fifteen days in July 2005.[38] The March 2005 suspension was for 1) her continued refusal to meet with Mastin as directed, and 2) implementing actions that were inconsistent with policies, procedures and job duties.[39] The July 2005 letter set forth sixteen specific grounds for the suspension, including but not limited to insubordination for her ongoing refusal to meet with John Mastin on a daily basis and failure to comply with other directives and meet job expectations.[40] Hervey was given the opportunity to provide Nelson with any information rebutting the stated grounds, but did not do so.[41]

Hervey falsely states in her Petition that she was suspended for explaining to a union employee her rights before investigating a possible workplace violation. First, this incident occurred in August 2005, following her return from suspension. Second,

---

[36] Pet.'s App., A-22.
[37] Pet.'s App., A-7.
[38] Id., A-54.
[39] App. Resp. Appell. Brief 7-9.
[40] Id., at 131-134.
[41] Id.

it involved Hervey questioning the person assigned as acting jail administrator during her suspension regarding what she had been doing while Hervey was gone. Further, this did not involve explaining union employment rights, but involved the issuance of a Garrity warning without authorization from either the Sheriff or County Attorney.[42] See Garrity v. New Jersey, 385 U.S. 493 (1967).

Hervey raises the issue of Mastin asserting on his application for his law enforcement license more than twenty-five years before the commencement of this lawsuit that he was not a felon. Mastin received a pardon for the underlying offense more than two decades before he became Undersheriff.[43]

Hervey falsely alleges that Mastin violated a union contract by failing to notify an employee of the right to representation. There is no obligation for an employer to notify a union member of the right to representation; it is up to the employee to request such representation.

Hervey brought suit against the County for alleged violation of her rights pursuant to the Minnesota Government Data Practices Act. Her claim was dismissed by the District Court. Hervey's contention that private personnel data was published in the newspaper is false.

Rich Mastin is a backup deputy who occasionally fills in at the Koochiching County Sheriff's Office.[44] He is not regularly scheduled there. He has no supervisory or administrative duties. His

---

[42] App. Resp. Appell. Brief, p. 19-20.
[43] Pet.'s Appell. Brief, p. 4.
[44] Pet.'s App., A-61.

full-time job is as Police Officer at the International Falls Police Department.[45] Rich Mastin was involved in a car accident while intoxicated.[46] His full-time employer suspended him. The Sheriff concurred with the discipline meted out by the City. The conduct was unrelated to his sporadic employment with the County.[47]

REASONS FOR DENYING THE PETITION

The arguments set forth in Hervey's Petition fail to demonstrate that a Writ of Certiorari should be granted in this case. The Eighth Circuit's decision affirming summary judgment in favor of Respondents is well-reasoned and consistent with controlling precedent. Hervey simply disagrees with the outcome. She has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. See Sup. Ct. R. 10.

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT HERVEY'S REFERENCE TO THE RESPECTFUL WORKPLACE POLICY WAS NOT PROTECTED CONDUCT UNDER TITLE VII.

In her Petition, Hervey attempts to confuse the issues by claiming that the Eighth Circuit held that opposing an employer practice by resorting to an internal policy against discrimination and harassment is not protected conduct. See Pet., p. 13.

---

[45] Id.
[46] Pet.'s App., A-62.
[47] Id.

However, the Eighth Circuit's decision did not diminish the standard for protected conduct and is consistent with this Court's rulings. See Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). Rather, the Eighth Circuit simply applied the law and determined that Respondents had no actual or constructive notice that Hervey had engaged in protected conduct under Title VII or the Minnesota Human Rights Act at the time that she had only referenced the Respectful Workplace Policy, but did not give any indication that she was alleging gender discrimination or harassment.

A. The Eighth Circuit's Decision does not Leave Employees who Resort to Internal Anti-Discrimination and Anti-Harassment Policies Unprotected.

Hervey attempts to portray the Eighth Circuit's decision as a setback to an employee's right to be free from retaliation for engaging in protected conduct is unpersuasive. Even if Hervey's brief mention of "respectful workplace issues" in April 2003 could be characterized as resorting to her employer's internal policy, she gave no indication that she was claiming gender discrimination or harassment under Title VII. The rights of an employee who actually does resort to his or her employer's internal policy to oppose an employer's unlawful discrimination or harassment are unaffected by the Eighth Circuit's decision in this case.

The Eighth Circuit dismissed Hervey's contention that she engaged in protected conduct as far back as April 11, 2003 when she first referred to respectful workplace issues. Pet.s' App., A-17. As the Court noted, the Respectful Workplace Policy applies to rude or disrespectful comments not based on unlawful discrimination, and Hervey's comments did not indicate that her issues were related to gender discrimination or harassment based on protected status. Id. As a result, Respondents had no actual or constructive knowledge of protected activity by Hervey as of April 2003. Id.

Hervey's first comment that could be construed as referencing the County's Respectful Workplace Policy on April 11, 2003 was not articulated as a gender discrimination or harassment issue. Hervey simply claimed that Nelson had "respectful workplace issues" and she gave no indication that her complaint was for anything more than rude or angry comments, which would be inconsistent with the Policy. See Pet.'s App., A-17. Unlike the facts of the cases cited by Hervey in her Petition, the record in this case demonstrates that Respondents could not have unlawfully retaliated against Hervey because they had no reason to believe she was complaining of conduct that might be protected by Title VII.

By the time Hervey did engage in Title VII protected conduct on February 12, 2004, by telling Mastin that she was filing a claim with the Minnesota Department of Human Rights, Hervey had already been accused of repeated acts of insubordination and was facing discipline for being AWOL. Id. The Eighth Circuit correctly

distinguished Hervey's allegations of retaliatory actions as simply the logical consequence of Hervey's pre-existing disciplinary problems. Pet.s' App., A-19. Despite Hervey's best efforts to shield herself from legitimate discipline by interjecting announcements of her discrimination claim, the Eighth Circuit correctly determined that Hervey could not create a submissible case of unlawful retaliation.

Moreover, the Eighth Circuit's decision is consistent with controlling precedent. In support of her Petition, Hervey relies on this Court's decision to consider Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 211 Fed. Appx. 373 (6th Cir. 2006). Hervey alleges that she, like the plaintiff employee in Crawford, has been left unprotected from retaliation because she used the County's internal policy to assert her claim. However, in Crawford, the employee had cooperated with her employer's internal investigation of sexual harassment and clearly asserted that her employer had sexually harassed her. Id. Unlike the employee in Crawford, Hervey never once mentioned gender discrimination or harassment until February 12, 2004, well after she was already having extensive disciplinary problems.

In Evans v. City of Houston, the plaintiff testified at a grievance hearing about allegations of racial and age discrimination. 246 F.3d 344 (5th Cir. 2001). Likewise, in Kotcher v. Rosa and Sullivan Appliance Center, Inc., the plaintiff made an internal complaint to protest sexually harassing actions of her supervisor. 957 F.2d 59 (2nd Cir. 1992). Finally, in E.E.O.C. v. Total Systems Services, Inc., the plaintiff

participated in an internal investigation and made allegations of explicit sexual harassment. 221 F.3d 1171 (11th Cir. 2000). The cases cited in Hervey's Petition do not address situations in which an employee referenced a general internal policy, but failed to indicate that the alleged complaint was based on discrimination or harassment.

Indeed, there is no support for the proposition that Hervey engaged in protected conduct simply by making a comment about "respectful workplace issues" in the context of discussing rude and angry behavior. The Eighth Circuit has not left Hervey unprotected simply because she used her employer's internal policy to bring forth her claims, but rather because she did not indicate anything about gender discrimination or harassment when she initially commented about "respectful workplace issues" prior to February 2004.

Contrary to Hervey's assertion, the Eighth Circuit's decision does not preclude an employee who uses an internal complaint procedure from coming under the protection of Title VII's anti-retaliation provisions. The decision simply reinforces that an employer cannot unlawfully retaliate against an employee if it has no reason to believe that the employee has engaged in protected conduct under Title VII. Hervey's claim that the Eighth Circuit's decision is in conflict with the decisions of other Courts of Appeal is disingenuous. None of the cases cited in her Petition relate to a situation in which the employer did not know that the employee had engaged in protected conduct under Title VII.

Interestingly, Hervey fails to discuss this Court's recent decision in White v. Burlington No. and S.F.R. Co., which addressed retaliation claims. 548 U.S. 53 (2006). The White decision does not remove the requirement that employees must establish a prima facie case of retaliation, including requiring a causal nexus between the protected conduct and the adverse employment action. Id. The Eighth Circuit applied the appropriate legal standards, as articulated in White, to the facts of this case and correctly dismissed Hervey's retaliation claim as a matter of law.

B. Hervey did not Oppose a Practice by Resort to Respondents' Internal Policy against Discrimination and Harassment.

Hervey bases her first argument for seeking a Writ on the misguided notion that she opposed a practice of her employer by resorting to the Respectful Workplace Policy. However, the record clearly reflects that Hervey did not take advantage of the internal procedures available to her under the Respectful Workplace Policy until February 2004. Prior to that, she never filed a complaint under the Policy or pursued any of the procedures to do so. Instead, Hervey simply relies on a comment she made during a conversation with Nelson about having "respectful workplace issues" as the basis for her claim that she resorted to her employer's internal policy. Pet.'s App., A-17. The Eighth Circuit correctly found that, under the circumstances, Hervey cannot be said to have engaged in protected

conduct in April 2003 or any time in 2003. Id. Accordingly, Hervey's concern about the Eighth Circuit's decision resulting in leaving employees who resort to internal policies unprotected under Title VII is clearly misplaced. Hervey never actually resorted to the internal policy herself. The first time that she informed the County that she wanted to file a complaint was not until February 12, 2004.

This Court has held that an employee's unreasonable failure to participate in an employer's internal complaint procedure may be an affirmative defense to liability. Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998). In this case, Respondents maintained a Respectful Workplace Policy, which encompassed prohibitions against gender discrimination and harassment, yet Hervey failed to take advantage of any preventative or corrective opportunities provided by the Policy. Her claims of being unjustly penalized by losing anti-retaliation protections under Title VII have no merit. Not only did she not engage in protected conduct under Title VII until February 12, 2004, but she never resorted to the County's internal Respectful Workplace Policy.

II. THE EIGHTH CIRCUIT'S DECISION CORRECTLY DETERMINED THAT HERVEY COULD NOT ESTABLISH CAUSATION BY TEMPORAL PROXIMITY ALONE.

Both the District Court and the Eighth Circuit correctly concluded that Hervey did not produce sufficient evidence of a causal connection to support

her retaliation claim. In Hervey's opinion, the mere fact that she filed a complaint of discrimination tied all future (and even past) actions by her employer back to that complaint, and resulted in retaliation. Hervey relied solely upon the timing of her actions, which she was able to manipulate, in relation to the alleged adverse employment actions to assert her retaliation claim. However, despite Hervey's best efforts to time her complaints to when she expected to be disciplined for prior conduct, she was unable to demonstrate the evidence necessary to support a causal connection in this case.

Hervey's behavior both before and after she filed a discrimination complaint weighs against a finding of a causal connection. Hervey's acts of misconduct after she engaged in protected conduct were worthy of discipline in their own right and did not require an inference of retaliatory motives by Respondents. Hervey repeatedly failed or refused to follow directives and engaged in insubordination. Respondents provided ample evidence of legitimate non-retaliatory reasons for their actions, but Hervey failed to provide any evidence of pretext.

Moreover, Hervey's filing of a complaint prior to *some* of her misconduct cannot insulate her from the legitimate consequences of that misconduct. As the Eighth Circuit observed, insubordinate employees cannot insulate themselves from discipline by announcing an intention to claim discrimination just before the employer takes action. Pet.'s App., A-24. The evidence in this case demonstrates that this is precisely what Hervey attempted to accomplish. Hervey's conduct during the February 12, 2004

meeting with Mastin is a perfect example of Hervey's attempts to avoid responsibility for her misconduct and take advantage of the situation to turn legitimate discipline into a basis for a retaliation claim. Coincidental timing and Hervey's belief of Respondents' nefarious motives, no matter how strongly-held the belief may be, cannot avoid summary judgment.

Hervey claims that summary judgment is not appropriate because Respondents did not provide evidence that Mastin intended to discipline Hervey before she informed him of her discrimination complaint. The Eighth Circuit correctly noted that Respondents did not bear the burden to show that they already intended to discipline Hervey before she interjected that she had engaged in protected conduct. Pet.'s App., A-20. The burden of persuasion remains with Hervey to show that more than temporal proximity supports her claim. Id. The record is clear that Mastin scheduled a meeting with Hervey to discuss her absence from work. It further shows that Hervey's announcement of her complaint occurred after Mastin accused her of taking leave without providing proper notice and lying about it. The mere fact that Hervey opportunistically informed Mastin of her complaint during the same meeting that she was informed of the intended consequences of her conduct cannot serve as the basis for a retaliation claim on its own. Moreover, regardless of when Hervey made the complaint, Hervey was indeed AWOL from work prior to the meeting with Mastin, making her claim that the discipline was unwarranted disingenuous at best.

A. Respondents have Produced Evidence of Their Legitimate Non-Retaliatory Reasons for Their Actions.

The record in this case is replete with Hervey's performance deficiencies and insubordination. Deficient performance and personality conflicts are legitimate, non-retaliatory reasons for adverse employment actions. See, e.g., Hannoon v. Fawn Eng'g Corp., 324 F.3d 1041, 1047 (8th Cir. 2003). The fact that Hervey was pursuing a discrimination complaint at the same time as her misconduct does not justify or excuse her misconduct. In addition, the question is not whether Hervey actually had poor performance, was insubordinate, or whether Respondents needed to make administrative changes due to budget cuts, but rather whether Respondents believed this to be the case when their actions were taken. See Hitt v. Harsco Corp., 356 F.3d 920, 924 (8th Cir. 2004).

The undisputed need to reduce costs due to budget constraints, Hervey's poor performance and insubordination, and personality conflicts between Hervey and Mastin based on Mastin's management style, which differed from that of Hervey's previous supervisors, constituted legitimate business reasons for Respondents' actions. None of these reasons were contradicted by evidence produced by Hervey. As the Eighth Circuit's decision points out, there is no evidence that the Respondents' motive for taking these actions was in retaliation for her engaging in protected conduct. Pet.'s App., A-25.

Although Hervey may disagree with the wisdom of Respondents' disciplinary and managerial decisions, Title VII does "not prohibit employment decisions based upon poor job performance, erroneous evaluations, personal conflicts between employees, or even unsound business practices." Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997) (quoting Hutson v. McDonnel Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)). Nor does Title VII "entitle courts to 'sit as super-personnel departments,' second-guessing the wisdom of businesses' personnel decisions." Id.

Hervey attempts to spin her failure to produce evidence as the Court resolving factual issues in favor of Respondents. However, the Eighth Circuit simply held Hervey to her burden to produce evidence beyond mere timing to support a reasonable inference of pretext and retaliatory motive. Without the Eighth Circuit's adherence to the standards established for retaliation claims, employers could never address performance or misconduct issues without fearing a retaliation claim. Hervey failed to meet her burden and her Petition is simply a last-ditch effort to create fact issues out of nothing more than temporal proximity.

Hervey claims that the Eighth Circuit's decision is contrary to other Circuits' holdings that employers must show a legitimate business reason with evidence in the record. Pet., p. 20. However, the Eighth Circuit's decision in this case is consistent in requiring the employer to provide evidence of non-retaliatory reasons for its actions. The difference is that, unlike the employers in the cases cited by

Hervey, the Respondents in this case met their burden by providing evidence of Hervey's insubordination, poor performance, personality conflicts with Mastin, and the County's budgetary constraints. Hervey, however, was unable to produce any evidence to support an inference of retaliatory motive. Pet.'s App., A-21.

In Mickey v. Zeidler Tool and Die, Co., cited by Hervey, the employee was able to present evidence that the employer's reasons were merely a pretext for retaliating against the employee and the alleged performance deficiencies and unavailability of work asserted by the employer had no basis in the record. 516 F.3d 516 (6th Cir. 2008). The employer's proffered reasons of performance deficiencies and dwindling availability of work for plaintiff were easily shown to be pretext where the employee had no record of discipline or negative evaluations and the employer had run advertisements seeking additional employees. Id., at 527.

Likewise, in Davis v. Team Electric Co., also cited by Hervey, the employee was able to provide evidence that the employer's proffered economic reason for laying her off was pretextual. 520 F.3d 1080 (9th Cir. 2008) (employer retained less senior electricians and employer conceded that employee was a skilled and dedicated worker).

These cases differ from the present case where Hervey has completely failed to produce evidence of pretext, and instead, simply asserts that the reasons are false. However, simply disagreeing with the employer's proffered reasons is not sufficient; the employee must provide evidence to support a

reasonable inference of retaliatory motive. The Eighth Circuit correctly concluded that summary judgment was appropriate because Hervey could not provide any evidence beyond her beliefs of Respondents' retaliatory motives. Accordingly, Hervey has not met her burden and summary judgment is appropriate.

III. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED SUMMARY JUDGMENT ON HERVEY'S GENDER DISCRIMINATION CLAIM BECAUSE SHE FAILED TO SHOW THAT SHE WAS TREATED DIFFERENTLY THAN A SIMILARLY SITUATED MALE EMPLOYEE.

Hervey completely failed to meet her burden of proof on her disparate treatment gender discrimination claim against Respondents. Hervey failed to produce any direct evidence of discrimination. However, the true weakness of Hervey's gender discrimination claim is that she failed to show that she was treated differently than similarly situated male employees. The comparators offered by Hervey were not similarly situated to her because of the vast differences in positions, duties, and conduct. Hervey ignores all similarly situated factors other than conduct in an attempt to raise doubt about the Eighth Circuit's decision. Despite her arguments relating to the semantics of the conduct factor, Hervey still fails to establish that Mastin or his step-son were similarly situated to her, and thus, she cannot satisfy her burden on her gender discrimination claim.

A. Hervey Failed to Identify any Similarly Situated Male Employees Who were Treated Differently.

In a futile attempt to meet her burden, Hervey alleged that she was treated less favorably than Mastin and Mastin's step-son, Rich. It is the plaintiff's burden to demonstrate that similarly situated employees were not treated equally. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). Hervey's comparisons, as the Eighth Circuit found, were unpersuasive because neither of them were "similarly situated" to her. The alleged inter-Circuit conflict regarding comparisons of conduct for similarly situated employees does not support Hervey's case. The comparison of conduct is only one factor in the similarly situated analysis. See Tolen v. Ashcroft, 377 F.3d 879, 882 (8th Cir. 2004) ("To be similarly situated, the comparable employees 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'") In her Petition, Hervey attempts to ignore the other factors and focus solely on the conduct comparison.

While Hervey focuses on the variations of the wording that other Circuits have used to compare the conduct of employees for similarly situated disparate treatment analysis, she fails to address the fact that, regardless of the disparity of the conduct, she is not similarly situated to Mastin or his step-son. In order to be similarly situated, "[i]ndividuals used for comparison must have dealt with the same supervisor, have been subject to the same standards,

and engaged in the same conduct without any mitigating or distinguishing circumstances." Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000), citing Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 487-88 (8th Cir. 1998).

The Eighth Circuit is not alone in considering a comparator's position, duties, and supervisor along with the conduct at issue. In her Petition, Hervey lists a case from each Circuit in an attempt to display a conflict in the similarly situated standard. However, the variations cited address only the comparable conduct factor for determining whether an employee is similarly situated. Hervey completely overlooks the other factors, such as position, duties, and supervisors, to draw the conclusion that there is a Circuit split. A careful and more thorough review of the similarly situated standards demonstrates that Hervey's sole reliance on the comparable conduct factor is misguided. Many of the cases cited by Hervey involve employees holding the same position with the same duties as the plaintiff. None of the cases involve employees found to be similarly situated even though they hold different positions with drastically different duties and report to different supervisors.

In her Petition, Hervey cites to a First Circuit case, Garcia v. Bristol-Myers Squibb Co., for the proposition that comparators need not be perfect replicas, but must "closely resemble one another in respect to relevant facts and circumstances." 535 F.3d 23, 31 (1st Cir. 2008). Hervey neglects to point out that the plaintiff in the Garcia case and her

comparator were both project engineers with the same supervisor.

Hervey's Second Circuit case, Graham v. Long Island RR, involved a plaintiff and comparators who were all car repairmen subject to the same discipline standards. 230 F.3d 34 (2nd Cir. 2000). Regardless of any perceived different standards for comparable conduct, Hervey cannot be considered similarly situated to Mastin or his step-son because of the more basic differences in their positions, duties, and supervisors.

In affirming summary judgment against the employee, the Third Circuit in Davis v. City of Philadelphia Water Dept., which is an unpublished case that has no precedential value, does not address the positions or duties of the plaintiff's alleged comparators. 57 Fed. Appx. 90 (3rd Cir. 2003). Like the other cases cited in her Petition, Davis does not support Hervey's contention that she is similarly situated to Mastin or his step-son.

The Fourth Circuit in the case cited by Hervey, Cook v. CSX Transportation Corp., affirmed summary judgment for the employer on a Title VII race discrimination claim. 988 F.2d 507 (4th Cir. 1993). The plaintiff's comparators for similarly situated purposes were also railroad workers. The Court did not address whether the plaintiff could have been similarly situated to his supervisor or other employees with different job duties. As a result, the Cook decision does not support Hervey's claim in this case. In fact, the Fourth Circuit has held that a part-time employee could not be similarly situated to a full-time nurse for a Title VII racial

discrimination claim. Bryant v. Aiken Regional Medical Centers Inc., 333 F.3d 536, 546 (4th Cir. 2003). Hervey fails to address how this decision impacts her attempted comparison to Rich Mastin, who only occasionally works for the County.

For her Fifth Circuit case, Hervey cites a twenty-six year old case, E.E.O.C. v. Brown & Root, Inc., which involves a female electrician's helper who was terminated for being incapable of performing assigned work when she was unable to work on an overhead steel beam. 688 F.2d 338, 339 (5th Cir. 1982). Without expressly addressing the positions and duties, the Court compared the plaintiff to male workers who also had to work on overhead steel beams for the similarly situated analysis. Id. Last year, the Fifth Circuit held that a nurse coordinator was not similarly situated to a doctor who engaged in similar misconduct because the positions were "considerably different." Strong v. University Healthcare System, L.L.C., 482 F.3d 802, 807 (5th Cir. 2007). The Court stated, "[w]e cannot assume, nor require, that hospitals discipline doctors and nurse coordinators in an identical fashion." Id.

The Sixth Circuit unpublished decision cited by Hervey, Perry v. McGinnis, involved a plaintiff and similarly situated employees consisting of his fellow hearing officers who were supervised by the same officials, subject to the same standards, and charged with the same duties. 209 F.3d 597 (6th Cir. 2000). More recently, the Sixth Circuit has confirmed its position when it held that a plaintiff was not similarly situated to a comparator where the comparator worked for a different supervisor, had

more seniority in the position, and worked in a more regional capacity than the plaintiff. Gragg v. Somerset Technical College, 373 F.3d 763, 768 (6th Cir. 2004).

Hervey's chosen Seventh Circuit case, Ezell v. Potter, demonstrates that a plaintiff must show that a comparator must be similarly situated with respect to performance, qualifications and conduct. 400 F.3d 1041, 1049 (7th Cir. 2005) (plaintiff compared to fellow letter carriers). "This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Id. A careful reading of Hervey's proffered cases demonstrates that she cannot be similarly situated to her supervisor or a deputy who works only occasionally for the County where they have different supervisors and duties. See also Burks v. Wisconsin Dept. of Transportation, 464 F.3d 744, 751 (7th Cir. 2006) (factors for similarly situated analysis include whether the comparators reported to the same supervisor, whether they were subject to the same standards, and whether they had comparable education, experience, and qualifications).

Again, Hervey's chosen Ninth Circuit case demonstrates the fallacy of the premise for her argument that conduct is the only relevant factor to determine whether employees are similarly situated. In Vasquez v. County of Los Angeles, the Ninth Circuit stated that, "individuals are similarly

situated when they have similar jobs and display similar conduct." 349 F.3d 634, 641 (9th Cir. 2004).

The Tenth Circuit, in Aramburu v. The Boeing Company, agreed that in order for employees to be similarly situated, they must deal with the same supervisor and be subject to the same standards governing performance evaluation and discipline. 112 F.3d 1398, 1404 (10th Cir. 1997). The Tenth Circuit's variation on conduct requiring that similarly situated employees must have violated the same rule or a similar rule does not matter if the employees are not similarly situated in the first place because of different jobs, supervisors, and standards.

Finally, Hervey's Eleventh Circuit cases, Nix v. WLCY Radio/Rahall Communications and Burke-Fowler v. Orange County, Florida, also involve plaintiffs and comparators who held the same positions with the same supervisor. 738 F.2d 1181 (11th Cir. 1984); 447 F.3d 1319 (11th Cir. 2006). In Nix, the plaintiff and comparator were both radio announcers, and in Burke-Fowler, the plaintiff and comparators were all corrections officers. Id. These cases, like the rest of the cases in Hervey's Petition, do not support her argument that she is similarly situated to Mastin and his step-son. In fact, the cases generally support the proposition that the similarly situated analysis must include a comparison of the jobs, duties, and supervisors, in addition to the conduct.

With respect to Hervey's comparison to Mastin, the differences in their positions are clear and provide no basis that they could be considered "similarly situated" for a disparate treatment

analysis. Mastin was the Undersheriff reporting directly to the Sheriff, and would (and did) perform all duties and functions of the Sheriff during a vacancy in office by operation of law. See Minn. Stat. § 375.08. Most significantly, Mastin was Hervey's supervisor. Employees in supervisory positions may not be similarly situated to their subordinates for disparate treatment purposes. See Burks v Wisconsin Dept. of Transportation, 464 F.3d 744, 751 (7th Cir. 2006); Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2004).

Hervey's comparison to Rich Mastin, an occasional fill-in deputy, is equally unavailing. Rich Mastin had no supervisory duties related to his employment by the County. He merely works on a sporadic basis for the County when he was not working as a full-time city cop. Pet.'s App., A-62. The idea that he could be similarly situated to the County's Jail Administrator, who had supervisory and administrative duties quite distinct from those of a licensed deputy, is clearly mistaken.

Without even considering the nature, extent, or severity of the conduct engaged in by Hervey, Mastin, or Mastin's step-son, the case law provides no support for the notion that Hervey could be similarly situated to them. The jobs are simply too different to allow a court to make an accurate comparison for a Title VII disparate treatment analysis. The general rule requiring the same position, duties, and supervisor for similarly situated employees is sound. When considering whether to discipline such dissimilar employees, many different factors would apply. Add in the fact that the discipline decisions in

this case would be made by different supervisors, and it is easy to see how inapt it would be to consider Hervey to be similarly situated to Mastin or his step-son.

B. Hervey Failed to Establish that she was Treated Differently than Similarly Situated Employees under any Comparable Conduct Analysis.

Even if focusing only on the comparable conduct factor of the similarly situated analysis, as Hervey would prefer, Hervey's comparisons to Mastin and his step-son still fail to demonstrate that they are similarly situated employees. The conduct of Mastin cited by Hervey consisted of a few unrelated, isolated incidents that occurred over several decades. Pet.'s App., A-13. With respect to Rich Mastin, the conduct cited by Hervey consisted of one off-duty incident that was unrelated to his part-time work for the County. Id., at A-14. On the other hand, Hervey engaged in repeated acts of workplace misconduct over a relatively short span of time. Hervey's persistent refusal to follow directions cannot logically be compared to the alleged isolated misconduct of John Mastin or Rich Mastin, regardless of which variation of the similarly situated standard is utilized. The Eighth Circuit held that Hervey's comparison failed because she could not show the same conduct. However, the evidence in the record demonstrates that the conduct of Hervey and her comparators was not of comparable seriousness, did not involve similar circumstances, was not similar in all relevant aspects, and did not involve violation of the same or similar rule.

Hervey was disciplined for repeated and persistent acts of insubordination occurring over a relatively short span of time, under the same supervisor and Sheriff. For example, Hervey refused to acknowledge the Department's reporting lines, refused to help find budget savings for the jail as directed, went over her supervisors' heads, complained about new duties and budget procedures, and took unauthorized absences. Pet.'s App., A-13. The record is replete with evidence that Hervey was insubordinate on a persistent basis. Hervey failed to show that any male employees were disciplined less severely for anything approaching similar repeated workplace misconduct.

The Eighth Circuit held that Hervey's comparison to Mastin involved circumstances that are "substantially different." Pet.'s App., A-13. Mastin's incident of alleged misconduct occurred many years ago, under a different Sheriff, and did not involve a pattern of behavior. Hervey's attempts to compare her discipline with Mastin's isolated incident of alleged misconduct was found equally unavailing by the Eighth Circuit, and would not support a reversal of summary judgment under any of the other Circuit's variations of the similarly situated standard.

The Eighth Circuit also found that Rich Mastin's misconduct, for which he was disciplined by his full-time employer, was not similar to Hervey's insubordination, and that the two employees were not similarly situated in all relevant respects for purposes of disparate treatment analysis. Id., at A-14. Rich Mastin, an occasional fill-in deputy who was

involved in off-duty misconduct, cannot be used as a viable comparator to Hervey, regardless of the variation of the similarly situated standard used. As a result, this case does not present the proper facts to consider the appropriate comparator test. Contrary to Hervey's assertion, the Eighth Circuit's analysis does not prevent Hervey from proving differential discipline. Pet., p. 22.

Different Circuit Courts of Appeal have applied slight variations of the similarly situated factors to analyze comparators for disparate treatment purposes. See Pet., pp. 23-25. While the Eighth Circuit accurately held that Hervey failed to provide any evidence of a similarly situated male employee receiving different treatment, Hervey attempts to seize upon the variations by other Circuits to frame the issue as a full-blown Circuit split. Contrary to Hervey's assertion, the "split among the Circuits" amounts to little more than slight variations of framing the issue, ranging from the "same offense" version to "comparable seriousness" to "similar circumstances." Under any version of the similarly situated standard, Hervey's claim fails as a matter of law.

Even assuming that a split exists, this case would not provide the appropriate facts to address the alleged conflict. As the record demonstrates, Hervey's claims would fail regardless of which variation of the comparator test is used. Hervey's failure to provide evidence that she was treated differently than a similarly situated employee cannot be salvaged by her alleged Circuit conflict relating to comparable conduct. Whether the issue is framed as

the "same conduct," "comparable seriousness," or "similar circumstances," Hervey fails to meet the standard in this case. Hervey's repeated workplace insubordination over a short period of time is not comparable to the alleged isolated, off-duty, or stale incidents of Mastin and his step-son. Hervey cannot set forth any standard that would allow her to prevail in this case. Accordingly, the Court should not grant the Writ.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

RATWIK, ROSZAK & MALONEY, P.A.
Ann R. Goering
Counsel of Record
Eric J. Quiring
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondents

Dated: December 8, 2008

RRM: 125853